Supreme Court, U.S.
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No. 06-934

IN THE

Supreme Court of the United States

MELVYN KAUFMAN,

Petitioner,

v.

JUDITH S. KAYE AND A. GAIL PRUDENTI,
IN THEIR OFFICIAL CAPACITIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), bars a federal court from issuing a declaratory judgment to remedy an unconstitutional internal procedure of a state judicial system, where the state courts repeatedly declined to consider the claim; there is no longer any pending state-court proceeding in which the federal claim can be raised; and the federal claim would not interfere with any act of adjudication by the state courts.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Melvyn Kaufman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-9a) is published at 466 F.3d 83 (CA2 2006). The opinion of the District Court (Pet. App. 10a-17a) is published at 2005 WL 1923561 (E.D.N.Y.).

JURISDICTION

The Court of Appeals' decision was issued on October 10, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be

granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

The Second Circuit held that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prevents federal courts from issuing declaratory judgments to ensure that internal procedures of state courts comply with the Constitution. The Second Circuit's sweeping holding would insulate virtually all state-court procedures from federal judicial scrutiny. The holding conflicts with this Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and with precedent in courts of appeals outside the Second Circuit.

The Second Circuit created additional circuit conflicts by applying the *Younger* doctrine even though: (1) the state courts had repeatedly refused to consider the federal constitutional claim; (2) at the time of abstention there was no pending state-court proceeding involving Petitioner in which the federal claim could have been raised; (3) the same plaintiff had initiated both the state-court and federal court actions, so that the federal suit was plainly not an effort to interfere with the state cases; and (4) the plaintiff had no obligation to bring the federal claim in state court rather than federal court. The Second Circuit generated substantial circuit conflicts on each of these points.

This case warrants this Court's review for the further reason that it presents an important question of federal law. It involves a fundamental right at the very heart of the judicial system: the guarantee of a fair and impartial judge. The Second Circuit's decision impermissibly restricts the authority of the federal courts to enforce this vital right. The decision represents an unlawful abdication of federal judicial responsibility and is contrary to 42 U.S.C. § 1983, as most recently reaffirmed in the Federal Courts Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847.

Moreover, this case arises at a critical time for the New York state judiciary. The federal courts have recently made extensive findings of constitutional violations in the manner by which New York selects state court judges, including the Appellate Justices involved in this case. *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (CA2 2006), *affirming* 2006 WL 213955 (E.D.N.Y. Jan. 27, 2006), petition for cert. filed, No. 06-766. The federal courts have found that the selection of state judges is anti-democratic and improperly controlled by party leaders. Grand jury investigations, guilty pleas, and a notable criminal conviction have led to allegations of serious corruption in the state judicial system. The federal courts have enjoined state judicial primary elections and judicial nominating conventions and have required that party nominations be settled by direct primary election until the state legislature is able to enact corrective legislation.

Under these circumstances, the Second Circuit's decision shielding state-court procedures from federal judicial scrutiny will only serve to weaken public confidence in the judiciary and to demean the principle of Equal Justice Under the Law. This Court's plenary review is amply warranted.

1. The Second Department's Case Assignment System Is Unique

The Appellate Division of the State of New York is divided into four judicial departments. Appeals in the Second Department are decided by panels of four or five Justices, who are selected from the total pool of appellate Justices sitting in the Second Department. A14. At the time the Complaint was filed in this case, there were twenty (20) appellate Justices in the Second Department.

The Second Department authorizes a court staff attorney, operating in secret, to assign appeals to panels of Justices at his unfettered discretion. A20-23. At the time of the assignment of the appeal, the attorney knows the names of the

parties, the nature of the appeal, and the issues presented. The system provides no judicial supervision, no transparency, and no neutral criteria or court-approved guidelines to constrain the attorney. The Second Department's policy is unique. No other state or federal court has adopted such a case assignment process, which virtually invites manipulation of case assignments on an arbitrary or discriminatory basis.

2. The Manipulation of Case Assignments in Petitioner's Appeals

Petitioner suffered the manipulation of case assignments first-hand. Over the course of eighteen months beginning in April 2001, Petitioner was the appellant in five separate appeals in the Second Department. Pet. App. 3a-4a, 12a-13a.[1] The cases raised purely state-law claims such as fraud, nuisance, property rights, and defamation. The cases involved different defendants and were not consolidated.[2]

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[1] Petitioner initially commenced a single lawsuit against the Village of Mamaroneck. The state Supreme Court dismissed the suit on the ground, *inter alia*, that "plaintiff has an adequate remedy available to him by bringing an action for an injunction against the property owners who are allegedly violating the zoning ordinance." *Kaufman v. Village of Mamaroneck*, Index No. 8224/00, mem. op. at 4 (Oct. 4, 2000). In effect, Petitioner was directed by the court to file additional litigation.

[2] The five appeals were: *Kaufman v. Village of Mamaroneck*, 295 A.D.2d 349, 743 N.Y.S.2d 880 (2d Dept. 2001), leave to appeal denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762 (2002); *Kaufman v. Office of Bldg. Inspector*, 295 A.D. 349, 743 N.Y.S.2d 880 (2d Dept. 2002); *Kaufman v. Farris*, 293 A.D. 654, 740 N.Y.S.2d 627 (2d Dept. 2002), leave to appeal denied, 99 N.Y.2d 505, 755 N.Y.S.2d 711 (2003); *Kaufman v. Fass*, 302 A.D.2d 497, 756 N.Y.S.2d 247 (2d Dept.), leave to appeal denied, 100 N.Y.2d 512, 766 N.Y.S.2d 166 (2003), cert. denied, 540 U.S. 1162 (2004); *Kaufman v. Kehler*, 305 A.D.2d 636, 759 N.Y.S.2d 765, leave to appeal denied, 100 N.Y.2d 614, 766 N.Y.S.2d 166, appeal dismissed, motion dismissed, 757 N.Y.S.2d 396, appeal denied, 100 N.Y.2d 614, 766 N.Y.S.2d 166, appeal denied, 1 N.Y.3d 504, 775 N.Y.S.2d 780 (2003), subsequent appeal, 5 A.D.3d 564, 772 N.Y.S.2d 841 (2d Dept. 2004).

Yet the same Justices repeatedly appeared on the panels deciding the appeals, reflecting an unmistakable pattern of manipulation in the assignment process. A15. For example, two appellate Justices, Justices Gabriel M. Krausman and Thomas A. Adams, were members of panels that decided four of the five appeals. *Id.* A third appellate Justice, Justice Stephen G. Crane, participated in three of the five appeals. *Id.* In the only appeal in which Justices Krausman and Adams did not sit, Justice Crane did. *Id.* In addition, three other Justices each appeared on two of the panels in the five appeals. A15-16.

The Clerk of the Second Department insisted that Petitioner's "cases were *randomly assigned* to panels established in advance and it was just a *coincidence* that those judges appeared on those panels."[3] Yet the likelihood that such a bizarre pattern would arise by chance was nearly impossible. In the District Court, unrebutted expert statistical evidence demonstrated that the probability of randomly assigning two specific Justices to four out of the five appeals was extraordinarily remote – 0.0004815%, or less than 1 in 200,000. A67-68. The likelihood of randomly selecting these Justices for four of the five appeals *and* selecting a third Justice for three of the five panels was even *lower* – 0.0000105%, or approximately *1 in 1,000,000.* A68. Put another way, Petitioner was roughly ten times more likely to be struck by lightning than to have received the panels assigned by the Second Department in his appeals.[4]

The proof of manipulated assignments was not limited to statistical evidence. There was also direct evidence of manipulation in certain litigation brought by limited liability

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[3] "Circuit Refuses to Oversee Selection of State Panels," N.Y.L.J., Oct. 13, 2006, at 4 (emphases added and quoting Clerk James E. Pelzer).

[4] *See* "How Likely Are You to Be Struck by Lightning?" available at www.stats.org.

companies ("LLCs) owned by Petitioner[5] and in three subsequent appeals by Petitioner involving unrelated issues and two different defendants. Pet. App. 17a n.5, A81. Despite the differences among the three subsequent appeals, all were set for argument on the same day – even though they had been awaiting argument for widely varying periods of time (74, 269, and 374 days, respectively). *Id.* At oral argument on April 4, 2005, the composition of the panel hearing the appeals was changed, with no prior notice, in a highly irregular "recusal" procedure,[6] so that Justice Adams

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[5] The LLCs brought lawsuits in New York state courts to enforce restrictive covenants regarding real property. A63. Petitioner's name was not listed in the caption of these cases. A63-64. Thus, the Second Department was initially unaware that the LLCs were associated with Petitioner. The appellate panel assigned to the first appeal by the LLCs did not include any of the Justices who had sat on the five initial appeals, which had been brought by Petitioner in his own name. *Id.* The LLCs were successful in their appeal, and the matter was properly remanded by the Second Department to the Supreme Court for Westchester County for discovery and fact-finding. *Id.* On a subsequent appeal of the same matter, however, the Second Department apparently had become aware of the LLCs' connection with Petitioner. The panel that had remanded the first LLC appeal for discovery and fact-finding was not assigned to the second LLC appeal and had no opportunity to decide whether its ruling had been subverted on remand. A64. Instead, the same Justice who adjudicated seven other of Petitioner's cases was assigned to the second LLC appeal, and the second panel came to a different conclusion than did the panel in the first LLC appeal. A65.

[6] When the Presiding Justice (Hon. Sondra Miller) announced the calendar before the arguments commenced, she stated for the first time that Justice Adams would be "substituting" for her on the three appeals. A81. With respect to a different appeal before the Court on April 4, there was a "Calendar Note" on the court schedule stating: "Justice Adams will sit for Justice Goldstein." *Id.* However, there was no such Calendar Note for the three appeals involving Petitioner. *Id.* Nonetheless, after calling the three appeals for argument, the Presiding Justice announced, "I am recused," and left her chair. *Id.* She gave no reason for the recusal and no explanation why she had chosen to advise the parties at the last possible moment. Justice Adams appeared and took her place on the panel as the Presiding Justice. *Id.*

was improperly named at the very last moment to the single panel hearing all three appeals. Thus, the same Justice (Justice Adams) was assigned to seven (7) of the eight (8) cases involving Petitioner. The odds against such a pattern of assignments occurring randomly were truly astronomical.

3. Petitioner Raised The Issue In The State Courts

In motions in the New York Court of Appeals for leave to appeal in five separate cases, Petitioner argued that the Second Department's case assignment process was unconstitutional.[7] In every instance, the Court denied or dismissed the motion. Petitioner filed a petition for writ of certiorari raising the same issue in *Kaufman v. Fass*, which this Court denied. 540 U.S. 1162 (2004).

Petitioner also raised the assignment issue with the Second Department in a letter to the Presiding Justice dated December 22, 2003. A43. No curative action was taken.

4. Petitioner's Federal Court Challenge

Because the state courts had repeatedly refused to entertain the constitutional claim, Petitioner turned to the federal courts. On August 13, 2004, he filed a Complaint under 42 U.S.C. § 1983 in the Eastern District of New York asserting that the policy for assignment of appeals to Justices in the Second Department is facially invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Complaint alleged that appeals are assigned to panels of Justices in a "secretive . . . process," with no publicly announced, neutral criteria, and accordingly are "subject to manipulation and closed-door maneuvering." A6. The Complaint also alleged that the assignment process had been manipulated in Petitioner's appeals. A7, 12-20.

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[7] *Kaufman v. Kehler*, No. 2003-0624 (filed June 24, 2003); *Kaufman v. Kehler*, No. 2003-0714 (filed July 14, 2003); *Kaufman v. Fass*, No. 2003-0804 (filed Aug. 4, 2003); *Kaufman v. Kehler*, No. 2003-1022 (filed Oct. 22, 2003); *9394 LLC v. Farris*, No. 2004-1216 (filed Dec. 16, 2004).

The Complaint sought prospective declaratory and injunctive relief and named as Defendants Judith S. Kaye, in her official capacity as Chief Justice of the Court of Appeals of the State of New York, and A. Gail Prudenti, in her official capacity as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York. A32-34.

On August 11, 2005, the District Court dismissed the Complaint in its entirety. Pet. App. 10a. The Court held that any attempt to vacate or overturn a particular decision by the New York state courts was barred by the doctrine of *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). Pet. App. 14a-15a. The Court explained, however, that "plaintiff's challenge to the process by which justices are assigned to hear cases is potentially distinguishable from his claims that the decisions rendered against him and the sanctions imposed should be vacated." *Id.* at 14a. "Therefore, this court does have jurisdiction over plaintiff's claim that the Second Department's assignment system generally violates due process because it is not random and can be manipulated." *Id.* at 15a (citing *Feldman*, 460 U.S. at 486).

The District Court did not accept Defendants' argument that abstention was mandated by *Younger v. Harris*, 401 U.S. 37 (1971). Instead, the District Court proceeded to the merits of Petitioner's claim, which it construed as an argument "that the Second Department's assignment system generally violates due process because it is not random and can be manipulated." Pet. App. 15a. The District Court held that "the random assignment of cases is not necessary to guarantee a party's rights." *Id.* at 16a.[8] Accordingly, the District Court

[8] The District Court also proposed an "efficiency" justification for the Second Department's assignment process, Pet. App. 16a-17a, even though the State had never articulated such a rationale, it is not in the court rules, and the record before the District Court offered no support for this justification. In a letter purporting to explain the assignment process in

dismissed the Complaint in its entirety and directed the clerk to close the case. *Id.* at 17a.

5. The Second Circuit's Decision

The Second Circuit affirmed on the basis of *Younger* abstention, even though the District Court had not relied on that ground. The Court of Appeals acknowledged that Petitioner had raised his federal claims unsuccessfully in prior state proceedings. Pet. App. 8a. Nonetheless, the Second Circuit held that "the relief now sought by [Petitioner] would be so intrusive in the administration of the New York court system that we must, based on applicable precedent, abstain." *Id.* at 5a. "[F]ederal courts may not entertain actions . . . that seek to impose 'an ongoing federal audit of state . . . proceedings.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974)).

The Second Circuit also opined that its decision was controlled by a line of its own precedent "reject[ing] a series of attempts by the federal district court to impose new requirements and bail procedures on the New York State courts." *Id.* at 6a (citing *Wallace v. Kern,* 481 F.2d 621 (CA2 1973) (*Wallace I*); *Wallace v. Kern,* 499 F.2d 1345 (CA2 1974) (*Wallace II*); *Wallace v. Kern,* 520 F.2d 400 (CA2 1975) (*Wallace III*)). "'[U]nder the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts.'" *Id.* (quoting *Wallace III*, 520 F.2d at 405).

Although it recognized that the state courts had repeatedly refused to consider Petitioner's federal claim, the Second Circuit opined that, "[w]ithout question, the New York courts can consider the constitutional questions [Petitioner] raises and order relief if they deem them to have merit." Pet. App. 8a. "Moreover, if he is dissatisfied with the

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Petitioner's appeals, the Clerk never suggested that the appeals were being treated as related cases according to the legal issues presented. A44.

decisions of the Appellate Division, he may petition the New York Court of Appeals and the Supreme Court of the United States for review." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S JUDGMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS

This Court has admonished that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards,* 504 U.S. 689, 705 (1992) (citation omitted). Further, this Court has warned that a federal court's decision to abstain must be based on clear legal rules, not on an impressionistic judgment that a federal suit might "interfere" in the abstract with a state judicial proceeding. *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 359 (1989) ("*NOPSI*") ("We have carefully defined, however, the areas in which such abstention is permissible, and it remains the exception, not the rule.") (internal quotation marks and citation omitted).

The court below misconstrued *Younger* as a broad shield preventing federal courts from considering any questions affecting state court operating policies, let alone from enforcing constitutional guarantees against the state courts. Nothing in *Younger* or its progeny handcuffs the federal courts in such a manner. To the contrary, this Court has held many state judicial procedures unconstitutional under the Fourteenth Amendment.[9] Under the Second Circuit's

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[9] *See, e.g., Holmes v. South Carolina*, 126 S.Ct. 1727, 1731-35 (2006) (state-court exclusion of defense evidence of third-party guilt denied defendant due process); *Deck v. Missouri*, 125 S.Ct. 2007, 2012 (2005) (bodily restraints in criminal trials); *Smith v. Robbins*, 528 U.S. 259, 265 (2000) (state courts must develop supervisory standards and "procedures [that] adequately safeguard a defendant's right to appellate counsel"); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-26 (1994) (holding

decision, the ability of the federal courts to enforce such guarantees will be cast into grave doubt.

In recent Terms, this Court has reined in the lower courts' overly expansive application of the *Rooker-Feldman* doctrine. *See Lance v. Young*, 126 S.Ct. 1198, 1201 (2006) (per curiam) ("Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule."); *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283 (2005) (warning that the lower courts have extended *Rooker-Feldman* "far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts"). The time has come to do the same with respect to *Younger*.

A. The Second Circuit's Decision Conflicts With Precedent Regarding Federal Challenges To The Operating Procedures Of State Courts

This Court's review is amply warranted because the Second Circuit's judgment conflicts with precedent of this Court and of other Courts of Appeals regarding the application of *Younger* abstention to federal suits under § 1983 seeking prospective relief with respect to the operating procedures of state courts.

The *Younger* doctrine had its genesis in a federal suit that directly challenged the legal basis of a pending state criminal prosecution. This case involves a federal constitutional challenge not to *substantive* state criminal law in a pending state case (as in *Younger* itself), but rather a constitutional

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that due process requires state courts to provide judicial review of the size of punitive awards); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-12 (1985) (state court class action procedures); *Testa v. Katt*, 330 U.S. 386, 393 (1947) (state courts may not use procedures that discriminate against federal claims).

attack on the *procedures* by which a state judiciary operates. This Court has twice addressed the application of *Younger* abstention to federal suits seeking prospective relief regarding the operations of state courts. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), on which the Second Circuit relied in this case, this Court held that a class of civil rights protesters was not entitled to federal judicial relief against local state prosecutors and judges allegedly engaged in discriminatory enforcement and administration of the criminal laws. Specifically, the plaintiffs charged that the defendant county magistrate and judge were regularly violating their rights in three respects: (1) setting bond in criminal cases based on an arbitrary schedule without regard to individual fact situations; (2) discriminatorily sentencing class members to longer and harsher sentences; and (3) unlawfully requiring civil rights protesters to pay for jury trials in local criminal proceedings. Although the court of appeals "did not attempt to specify exactly what type of injunctive relief might be justified, it at least suggested that it might include a requirement of 'periodic reports of various types of aggregate data on actions on bail and sentencing.'" *Id.* at 674 n.1 (citation omitted). This Court reversed, on the grounds that federal judicial relief was barred by *Younger* and that the plaintiffs had failed to show concrete injuries.

With respect to *Younger*, this Court explained that the *O'Shea* plaintiffs failed to challenge a specific state procedural policy or practice as facially unlawful. Instead, they sought wholesale and ongoing federal judicial supervision of state court proceedings: if a discriminatory ruling occurred during the administration of otherwise lawful state-court procedures, the plaintiffs urged the federal courts to interrupt the state proceeding on an *ad hoc* basis to correct the state court's aberrant ruling. This Court concluded that such "piecemeal interruptions of the state proceedings" would be "intrusive and unworkable." *Id.* at 500.

> Respondents do not seek to strike down a single state statute . . . . [R]espondents apparently contemplate that prosecutions will be brought under seemingly valid state laws. What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. . . . Apparently the order would contemplate *interruption* of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an *ongoing* federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent.

Id. (emphases added).

But the very next Term, this Court made clear that *O'Shea* does not establish a sweeping rule foreclosing all federal judicial relief affecting the internal operations of state courts, even in the criminal context, where a state's interests are at their apogee. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that *Younger* does not preclude a federal court from enjoining a specific state court procedural policy as unconstitutional.[10] *Gerstein* involved a Florida procedure allowing prosecutors to charge noncapital offenses by means of an information, without a preliminary hearing or leave of court. Several arrestees detained under this procedure filed a class action against county officials in federal District Court alleging that they had "a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief." *Id.* at 107. The State of Florida argued that *Younger* compelled abstention because federal action would interfere with state proceedings by requiring the state to grant prompt probable cause hearings

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[10] The Second Circuit did not cite *Gerstein* in its decision even though Petitioner had raised that case in the briefing before the court.

contrary to the state's own procedures. This Court unanimously rejected the state's attempt to invoke *Younger*:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions . . . [under] *Younger v. Harris*. The injunction was not directed at the state prosecutions as such, but only at the legality of the pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9 (citations omitted). This Court has continued to adhere to *Gerstein*. For example, in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), this Court explained that, while "the Constitution does not impose on the States a rigid procedural framework" for providing prompt determinations of probable cause to persons arrested without a warrant, "flexibility has its limits," and states do not enjoy "a blank check." *Id.* at 53, 55 (citing *Gerstein*). Accordingly, states are "not immune from systemic challenges, such as . . . class action[s]," regarding probable cause procedures. *Id.* at 59. *See also Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736-37 (1980) (permitting federal challenge to state judicial rules prohibiting attorney advertising); *Moore v. Sims*, 442 U.S. 415, 431 (1979) (*Gerstein* "held that the District Court properly found that the action was not barred by *Younger* because the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves.").

The Second Circuit's decision obliterates the distinction drawn in *Gerstein* and *O'Shea*. *Gerstein* makes clear that a federal court may entertain a facial constitutional challenge to state court policies or procedures when the federal claim is collateral to the issues presented by a specific state-court

proceeding. *O'Shea* demonstrates merely that the lower federal courts may not supervise the *as-applied, case-by-case* operation of state-court procedures that are concededly valid on their face. The Second Circuit's expansive decision will bar all federal court challenges to the procedures or operations of state courts. The Second Circuit opined broadly that "under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." Pet. App. 6a (internal quotation marks and citation omitted). Under such reasoning, federal courts would be powerless to remedy blatantly unconstitutional state court policies – such as racially discriminatory policies for jury selection, or systems for compensating judges that deny the right to an impartial decisionmaker,[11] or New York's unconstitutional case assignment system in the instant case.

It was immaterial to the Second Circuit that Petitioner raised a prospective-only, facial challenge to the Second Department's assignment policy, rather than (as in *O'Shea*) an as-applied attack on the administration of concededly valid state-court rules. It was immaterial to the Court of Appeals that Petitioner's federal court challenge would not have interfered with the appellate disposition of any case, but would have affected only the manner in which the state court assigned appeals to panels of Justices – and even then would not have imposed any particular method for making objective and neutral assignments. And it was immaterial to the Second Circuit that the federal claim raised by Petitioner was wholly collateral to the issues presented in the state-court actions. These state cases involved private parties, not state officials, and raised questions of state law (such as fraud, nuisance, property law, and defamation) having nothing to do with the constitutionality of the Second Department's assignment system. In contrast, Petitioner's federal suit was a

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[11] *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60-61 (1972).

facial attack on an overall state-court procedure that was not connected to any of the issues raised in the prior state-court proceedings. The state and federal proceedings were thus completely separate from each other. But under the Second Circuit's broad rule, all federal challenges implicating internal state-court procedures are barred by *Younger*.

The Second Circuit's decision is inconsistent with *Gerstein* and with decisions in the First and Third Circuits that have faithfully followed *Gerstein*. For example, in *Fernandez v. Trias Monge*, 586 F.2d 848, 852 (CA1 1978), the First Circuit held that, under *Gerstein*, *Younger* did not block a challenge to a Puerto Rican procedure of pretrial detention for juveniles accused of crimes. The court explained that the plaintiffs' federal claims addressed the facial constitutionality of the state-court procedures, rather than their daily administration: "The instant claim addresses the statutory procedure, not its daily administration; relief, fashioned after *Gerstein v. Pugh*, would outline only the minimum due process standard, leaving the choice of procedures and the operational details to the Commonwealth." *Id.* at 851 n.2.

In *Stewart v. Abraham*, 275 F.3d 220, 225 (CA3 2001), the Third Circuit followed *Gerstein* in holding that a district court was not required to abstain under *Younger* from considering a Fourth Amendment claim against a city's policy allowing the district attorney to "re-arrest" a defendant (by reinitiating criminal charges that had been dismissed at a previous preliminary hearing), without a judicial determination that the district attorney had probable cause to believe that the defendant had committed a felony. The Third Circuit explained that, "[i]n *Younger*, the federal plaintiff requested that the District Court find unconstitutional the law under which the government was prosecuting him and thereby foreclose his prosecution. In this case, the equitable relief requested is not aimed at state prosecutions, but at the legality of the re-arrest policy and the pretrial detention of a class of

criminal defendants." *Id.* at 225. *See also Conover v. Montemuro*, 477 F.2d 1073, 1082 (CA3 1972) ("Declaratory relief with respect to the intake procedures will not necessarily hinder the eventual adjudicatory process of the Court of Common Pleas or substitute federal fact finding in any case in which a petition for adjudication of delinquency may be tried. . . . Since a remedy with respect to the intake procedures would not necessarily interfere with the adjudication functions of the Commonwealth's juvenile court, it is therefore not necessarily precluded by *Younger v. Harris*"); *Parker v. Turner*, 626 F.2d 1, 8 (CA6 1980) (noting the "distinctions" between *O'Shea* and *Gerstein*, including "whether the issue raised is collateral to the principal state proceeding," and explaining that *Gerstein* permits a "claim address[ing] the statutory procedure, not its daily administration"). The Second Circuit's judgment is inconsistent with these decisions.[12]

The need for this Court's review is heightened because the Second Circuit is not the only court of appeals to have misinterpreted *Gerstein*. The Fifth, Tenth, and Eleventh Circuits have also improperly barred federal court review in a manner that violates *Gerstein*.[13] This Court's review is needed to clarify and re-affirm the line drawn by *Gerstein* and *O'Shea*, which has been the subject of confusion and inconsistent application in the lower courts.

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[12] *Anthony v. Council*, 316 F.3d 412, 421 (CA3 2003), cited by the Second Circuit (Pet. App. 6a) is not to the contrary. In that case, the Third Circuit held that an as-applied claim was barred by *O'Shea*. 316 F.3d at 415 (plaintiffs "contend the presiding judges failed to inform them of their right to counsel and, if indigent, to appointed counsel, and moreover, the judges failed to appoint counsel for them"). The instant case, by contrast, is governed by *Gerstein* rather than *O'Shea*.

[13] *Joseph A. v. Ingram*, 275 F.3d 1253, 1271 (CA10 2002); *Pompey v. Broward County*, 95 F.3d 1543, 1549 (CA11 1996); *Luckey v. Miller*, 976 F.2d 673, 677 (CA11 1992); *Ballard v. Wilson*, 856 F.2d 1568, 1570 (CA5 1988); *Williams v. Rubiera*, 539 F.2d 470, 473 (CA5 1976).

B. The Second Circuit's Decision Conflicts With Precedent Regarding The Elements of *Younger* Abstention

This Court's review is warranted for a separate reason: even if (contrary to this Court's decision in *Gerstein*) *Younger* abstention were triggered by collateral federal challenges to state-court operating procedures, the Second Circuit's judgment would be contrary to precedent in this Court and many other circuits regarding the legal elements of *Younger* abstention. The Court of Appeals held that abstention was required even though (1) the New York courts had refused on six prior occasions to remedy the constitutional violation; (2) at the time of the federal decision to abstain there was no pending state-court case in which Petitioner could have raised the federal claim; (3) there was no danger that the federal claim would disrupt state proceedings, because the plaintiff in the federal case was also the plaintiff in the former state cases; and (4) Petitioner was under no duty to commence a separate state-court action to raise the federal claim. On each of these points, the Second Circuit's decision created a circuit conflict.

1. The State Courts Had Previously Refused to Consider The Federal Claim

First, the Second Circuit applied *Younger* even though it recognized that the New York courts had the opportunity to hear Petitioner's federal claim on six prior occasions and had refused to grant relief every time. *Younger* is "designed to allow the State an opportunity to 'set its own house in order.'" *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80 (1977). "Once the state court has announced that it will not entertain constitutional arguments, *Younger* is no longer applicable." *General Auto Service Station LLC v. City of Chicago*, 319 F.3d 902, 905 (CA7 2003) (Easterbrook, J.); *see also Fernandez v. Trias Monge*, 586 F.2d 848, 853-54 (CA1 1978) ("plaintiff's unsuccessful efforts in Commonwealth courts do not alter but rather strengthen our

conclusion that *Younger* restraint was unwarranted since no adequate remedy in the ordinary course of Commonwealth proceedings was, in fact, available"); *Parker v. Turner,* 626 F.2d 1, 10 (CA6 1980) ("[F]ederal relief is not foreclosed forever. Should the Tennessee appellate courts be unable or unwilling to correct continuing unconstitutional conduct by the Juvenile Court judges, plaintiffs would then be in a position of showing 'exceptional circumstances' which would warrant federal injunctive relief.").

Thus, the Second Circuit's decision conflicts with precedent in the First, Sixth, and Seventh Circuits recognizing that *Younger* does not apply where the state courts have refused to consider the federal claim.

2. There Was No Pending State-Court Proceeding

The Second Circuit also ereated a conflict with decisions of this Court and *nine* other circuits by applying *Younger* at a time when there were no pending state-court proceedings involving the federal plaintiff.[14] This Court has stressed that "we have never applied the notions of comity so critical to *Younger's* 'Our Federalism' when no state proceeding was pending. . . . Absent any pending proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992); *see also Wooley v. Maynard,* 430 U.S. 705, 711 (1977) (*Younger* did not bar federal action where state proceedings had been completed: "the suit is in no way 'designed to annul the results of a state trial' since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate

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[14] Petitioner had standing because he was involved in pending Second Department litigation when the federal complaint was filed, which is the relevant time for assessing jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 830 (1989). Petitioner contended that the case was not moot because his ongoing business and property interests meant that the dispute was capable of repetition yet evading review. The Second Circuit did not resolve the issue. Pet. App. 9a n.1.

appellees' constitutional rights") (citation omitted); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) (*Younger* inapplicable where "[n]o state proceedings were pending against either [federal plaintiff] at the time the District Court issued its preliminary injunction"); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) ("the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding'") (citation omitted).

Plainly, a federal court cannot "interfere" in state cases if no such cases are pending. For just that reason, this Court has emphasized that *Younger* abstention is permissible "only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.' In [all] other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984) (citation omitted).

Steffel explained that to require "the federal courts totally to step aside when no state [case] is pending against the federal plaintiff would turn federalism on its head." 415 U.S. at 472. In light of this Court's clear guidance, it is hardly surprising that many other circuits have recognized that abstention is impermissible in the absence of a pending state case.[15] Tellingly, this principle was honored by the First,

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[15] *See, e.g.*, **First Circuit:** *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 266 (CA1 1993) (doctrine invoked only "when litigation between the same parties and raising the same issues is . . . pending in a state court"); **Third Circuit:** *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 184 n.4 (CA3 2006) ("our precedent makes clear, however, in the absence of a[n] [ongoing] state prosecution, federal-state abstention doctrine is irrelevant and *Younger* does not apply"); *Guarino v. Larsen*, 11 F.3d 1151, 1157 n.1 (CA3 1993) ("*Younger* itself does not apply to this case because the state proceedings were completed by the time the district court took action on the merits — there was no *pending* state proceeding that the district court enjoined.") (emphasis in original); **Fourth Circuit:** *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 462 (CA4 2005) (abstention under *Younger* was inappropriate

Third, Fifth, and Tenth Circuit cases that the Second Circuit cited as being "in agreement" with its decision. Pet. App. 6a-7a.[16] This Court's review is necessary because of the circuit

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because "no ongoing state judicial proceeding exists"); *Employers Res. Mgmt. Co. v. Am. Employers Benefit Trust*, 65 F.3d 1126, 1134 (CA4 1995) ("*Younger* abstention is appropriate only where three conditions are met, including, (1) there is an ongoing state judicial proceeding."); **Fifth Circuit:** *Baran v. Port of Beaumont Nav. Dist.*, 57 F.3d 436, 441 (CA5 1995) ("when, as here, no state judicial proceedings are pending, abstention under *Younger* is unavailable"); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490 (CA5 1995) ("[w]hen no state proceedings are pending, a federal action does not interfere with or insult state processes and the policies on which the *Younger* doctrine is premised have little force") (internal quotation marks and citations omitted); *American Bank and Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 (CA5 1993) (*Younger* is "obviously unavailing; there are no pending state judicial proceedings in this case"); **Seventh Circuit:** *Edwards v. Illinois Bd. of Admissions to Bar*, 261 F.3d 723, 727-28 (CA7 2001) ("'abstention is no longer appropriate'" where "state proceedings relevant to this appeal terminated when the [state] Supreme Court declined plaintiff's petition for review") (citations omitted); *Greening v. Moran*, 953 F.2d 301, 305 (CA7), *cert. denied*, 506 U.S. 824 (1992) (Easterbrook, J.) (once "the state proceeding has reached its end, abstention is no longer appropriate"); **Eighth Circuit:** *Bressman v. Farrier*, 900 F.2d 1305, 1316 n.14 (CA8 1990), *cert. denied*, 498 U.S. 1126 (1991) ("It has long been the rule that federal courts should abstain from interfering in ongoing state . . . proceedings," but should "abstain only from reviewing current proceedings") (citations omitted); **Ninth Circuit:** *M&A Gabaee v. Community Redevelopment Agency of City of Los Angeles*, 419 F.3d 1036, 1042 (CA9 2005) ("'*Younger* abstention requires that the federal courts abstain when state court proceedings were ongoing at the time the federal action was filed.'") (citation omitted); **Tenth Circuit:** *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1232-33 (CA10 2001) ("*Younger* abstention is appropriate only if . . . a party asserts federal claims that have been or could be presented in ongoing state proceedings") (citation omitted); **D.C. Circuit:** *Worldwide Moving & Storage, Inc. v. District of Columbia*, 445 F.3d 422, 425 (CADC 2006) ("'a federal court may dismiss a federal claim [pursuant to *Younger*] only when there are ongoing state proceedings that are judicial in nature'") (citation omitted).

[16] *See Anthony v. Council*, 316 F.3d at 418 (recognizing that, in general, "*Younger* abstention is appropriate" only if there are "'ongoing state

conflict created by the Second Circuit on the crucial issue of whether *Younger* is applicable in the absence of a pending state proceeding.

3. The Federal And State Proceedings Involved The Same Plaintiff

The Second Circuit created a further circuit conflict by applying *Younger* where the same plaintiff had initiated both the state-court and federal court actions. In the paradigm situation calling for *Younger* restraint, the state defendant brings a federal action challenging the state statute which is simultaneously being applied against him. *E.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (federal plaintiff seeking to enjoin state plaintiff from enforcing judgment); *Moore v. Sims*, 442 U.S. 415 (1979) (federal plaintiffs seeking to enjoin state proceedings against them for child abuse). As Judge Posner has explained: "The core of the *Younger* doctrine is the proposition that a person who is being prosecuted by a

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proceedings that are judicial in nature'") (citation omitted); *Joseph A.*, 275 F.3d at 1268 (noting that "*Younger* requires that a federal court refrain . . . 'when [the] federal proceedings would (1) interfere with an ongoing state judicial proceeding'") (citation omitted); *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 467 (CA1 1989) (holding that the district court's decision to abstain was erroneous because there was no pending "state-initiated proceeding, criminal or civil, to enjoin" and "[t]his is therefore not a case threatening interference with ongoing state proceedings or practices" suitable for abstention under either *Younger* or *O'Shea*); *Ballard v. Wilson*, 856 F.2d at 1570 (holding that "the pending proceedings for Ballard's parking violations are all state criminal prosecutions which clearly bring his § 1983 claim within the scope of *Younger*."). By contrast, the Sixth and Eleventh Circuits have agreed with the Second Circuit. *See Parker v. Turner*, 626 F.2d at 4 (abstaining even though there no were "contempt proceedings pending against any of the named plaintiffs"); *Pompey v. Broward County*, 95 F.3d 1543, 1547 (CA11 1996) ("reject[ing] the plaintiffs' argument that *Younger* only bars federal courts from restraining ongoing state court prosecutions"); *Luckey v. Miller*, 976 F.2d 673, 677-78 (CA11 1992) (holding that *Younger* abstention was appropriate even though plaintiffs "do not seek to contest any single criminal conviction nor restrain any individual prosecution").

state for violating its laws is not allowed to derail the prosecution by bringing a suit in federal court to enjoin the prosecution on the ground that the state statute on which it is based is unconstitutional." *Hoover v. Wagner*, 47 F.3d 845, 848 (CA7 1995).[17]

In this case, the Second Circuit applied *Younger* even though Petitioner was the plaintiff in both the federal and (prior) state-court actions. In so doing, the Second Circuit created a conflict with at least five other courts of appeals holding that *Younger* abstention does not apply "when a federal plaintiff also is the plaintiff in state court." *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1360 n. 8 (CA9 1986); *see also Confederated Salish v. Simonich*, 29 F.3d 1398, 1405 (CA9 1994) (same).

In particular, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized that *Younger* is inapplicable where, as here, a state-court plaintiff subsequently files suit in federal court. For example, Judge Posner has castigated such a *Younger* claim as "frivolous," reasoning that unlike the paradigmatic *Younger* case, where "the state has instituted a criminal, disciplinary, or other enforcement proceeding against" the federal plaintiff, *Younger* is inapplicable where "[t]hat is not th[e] case," where, for example, the federal plaintiff "is not accused of having violated any state law, and the state has not instituted

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[17] *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 701-02 (CADC 1984) ("[V]irtually all post-*Younger* cases have involved collateral attacks in federal court on state enforcement proceedings brought against the federal plaintiff. . . . The need or wisdom of extending *Younger* to all constitutional claims that might be adjudicated in state as well as federal courts, however, is far more problematical. This extension would make federal courts cinderellas to their sister state courts in adjudicating federal constitutional rights, their native area of competence and jurisdiction.").

any proceedings against him; he merely is pursuing parallel remedies." *Nader v. Keith*, 385 F.3d 729, 732 (CA7 2004).[18]

Tellingly, none of the cases cited by the Second Circuit as being "in agreement" with its decision, Pet. App. 6a-7a, involved the situation where the same party was the plaintiff in both the federal and state actions. Thus, the federal plaintiffs in *Parker*, *Anthony*, *Joseph A.*, *Pompey*, *Luckey*, *Planned Parenthood*, and *Ballard* had been or still remained defendants in the underlying state court proceedings. This Court's review is needed to address the conflict generated by the Second Circuit.

4. The Second Circuit Created An Impermissible Exhaustion Requirement

After giving the New York State courts six opportunities to consider his challenge to the constitutionality of the assignment system in this case, Petitioner chose to bring his constitutional challenge in federal court. He had every right to do so. The Second Circuit's holding that Petitioner was nonetheless obliged to raise his federal claims in state court

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[18] *See also Wexler v. Lepore*, 385 F.3d 1336, 1340-41 (CA11 2004) ("Other circuits have reached the same conclusion [that] [t]he *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts."); *General Auto Service Station LLC v. City of Chicago*, 319 F.3d 902, 905 (CA7 2003) (per Easterbrook, J.) (*Younger* does not apply because "[w]hether it sues in state or federal court, General Auto will be the plaintiff"); *Rogers v. Desiderio*, 58 F.3d 299, 301 (CA7 1995) (per Easterbrook, J.) (holding that *Younger* did not apply to a federal lawsuit brought by a plaintiff who had also brought a state court suit challenging the same state action, and noting that the court could not find a single case "applying the *Younger* principle to two suits filed by the same party"); *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 30 (CA6 1984) ("In our case, the federal plaintiffs are also plaintiffs in the state court action. In addition, the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.").

created an additional conflict with decisions of this Court and of other circuits.

First, under this Court's holdings, the state-court option did not constitute an adequate remedy. If Petitioner had sought the recusal of individual appellate judges or had moved the Second Department to have his appeals reassigned to new panels, any reassignments would have occurred under the same court procedures Petitioner had challenged as unconstitutional. This Court has made clear that abstention doctrines do not require a litigant to engage in the futile charade of exhausting the very remedies that he contends are invalid.[19] The Second Circuit's judgment conflicts with these decisions.

Moreover, the Second Circuit effectively imposed an unlawful exhaustion requirement on federal civil rights plaintiffs that is contrary to decisions in this Court and other circuits. Indeed, *Gerstein* itself involved federal plaintiffs who could have filed their constitutional claims in a state-court § 1983 action, but this Court was unmoved that such a possibility provided a sufficient opportunity. "[A] person who claims that someone has violated his civil rights may bring suit in federal court under 42 U.S.C. § 1983 without exhausting remedies that state law makes available." *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 267 (CA1 1987) (Breyer, J., dissenting); *see also Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982) (no requirement that federal § 1983 plaintiff exhaust state-court remedies). Even where "a facial challenge to an allegedly unconstitutional"

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[19] *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (party would "have to appeal to the very court" whose policies were in dispute); *Juidice v. Vail*, 430 U.S. 327, 340 (1977) (Stevens, J., concurring in judgment) ("If, as appellees contend, these procedures violate the Due Process Clause of the Fourteenth Amendment, they cannot provide an adequate remedy for appellees' federal claim."); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) ("the predicate for a *Younger v. Harris* dismissal was lacking" where plaintiff alleges defect in state process).

state law may "affect, or for practical purposes pre-empt, a future — or . . . even a pending — state-court action," there is no requirement that it "be brought in state courts." *NOPSI*, 491 U.S. at 372-73. "[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *Id.* at 373.

Accordingly, other circuits have ruled that a litigant in Petitioner's shoes has no obligation to exhaust state remedies where, as here, the federal constitutional question does not arise on the face of the state-court complaint.[20] As the Sixth Circuit has explained:

> We are aware of no case in which a federal plaintiff is deemed to have the "opportunity" to have his or her federal claim heard in a state proceeding solely because the plaintiff could have amended an existing complaint or filed a new complaint in state court. If that were the rule, *Younger* abstention would almost always be appropriate, because there are few situations in which a federal plaintiff would not be able to file the federal suit in state court. ... Unless the issue in the plaintiff's federal suit would be resolved by the case-in-chief or as an affirmative defense to the state court proceedings that exist, it cannot be said that the state proceedings afford the federal plaintiff an adequate opportunity to have his or her claim heard for *Younger* purposes.

Habich v. City of Dearborn, 331 F.3d 524, 531-32 (CA6 2003).[21]

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[20] Petitioner's state-court actions did not present federal constitutional challenges to the state-court assignment procedures; rather, the actions involved state-law claims (property law, tort, and other state-law issues) against private defendants, not state officials.

[21] *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 529 (CA7 1988) (Easterbrook, J.) ("The state maintains that Bethune could have petitioned a state court for relief . . . , but this confuses *Younger* with a requirement

The Second Circuit's holding that Petitioner was obligated to raise his federal claim in the state courts therefore conflicts with precedent of this Court and of other circuits.

II. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW

This Court's review is also amply warranted because this case presents vital questions of federal law. At issue is one of the most ancient and fundamental of all rights: the guarantee of a fair judicial decision-maker. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "[D]ue process requires a 'neutral and detached judge in the first instance.'" *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pens. Trust*, 508 U.S. 602, 617 (1993) (citation omitted). The Second Circuit all but eliminated the authority of the lower federal courts to enforce this right in cases involving state-court internal procedures.

Review is warranted because Congress, not the judiciary, sets the limits of federal judicial jurisdiction within constitutionally permissible bounds. *NOPSI*, 491 U.S. at 359. Chief Justice Marshall famously noted that "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). The Second Circuit's decision violates the principle that the federal courts "cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (citations omitted). This Court has made clear that "Our Federalism" "does not mean blind deference

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of exhaustion of state judicial remedies, and there is none in § 1983 actions."); *Fernandez v. Trias Monge*, 586 F.2d 848, 852-53 (CA1 1978) ("the fact that the federal plaintiff could have sought an injunction . . . in a completely separate Commonwealth court proceeding outside the four corners of the pending state prosecution, is of no consequence to plaintiff's § 1983 action").

to 'States' Rights,'" but instead a "system in which there is sensitivity to the legitimate interests of both State and National Governments." *Younger*, 401 U.S. at 44. The Second Circuit improperly redrew the jurisdictional lines established by Congress.

The Second Circuit's sweeping ruling is contrary to the Federal Courts Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847, which reaffirmed the power of the federal courts to issue declaratory relief against state judiciaries and state judges in their official capacities.[22] The Senate Report made clear that "litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable." S. Rep. No. 104-366 at 36-37, 1996 USCCAN 4202, 4216-17.

This Court's review is especially urgent in light of the scandal currently surrounding the New York judiciary. The manner by which New York selects its state-court judges, including Appellate Justices,[23] has recently been held unconstitutional by the U.S. District Court for the Eastern District of New York, in a decision affirmed by the Second Circuit. *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (CA2 2006), *affirming* 2006 WL 213955 (E.D.N.Y. Jan. 27, 2006), petition for cert. filed, No. 06-766. After conducting a 13-day hearing with 24 witnesses and more than 10,000 pages of documents, the district court issued a 45-page opinion with detailed factual findings documenting that the

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[22] The 1996 Act amended 42 U.S.C. § 1983 to read: "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

[23] In New York, Appellate Justices are drawn from the pool of elected trial court judges, known as "Supreme Court Justices." They are appointed by the Governor to sit in one of the four Appellate Divisions of the State. N.Y. Const., Art. VI, §§ 4, 71. All Justices, even those serving in the Appellate Divisions, must be re-elected at the conclusion of their 14-year terms. *Id.* at § 6(c).

process of judicial selection is impermissibly controlled by party bosses and local political leaders. The district court issued an injunction prohibiting judicial primary elections and judicial nominating conventions and requiring that party nominations be settled by direct primary election until the New York State Legislature can enact corrective legislation. The Second Circuit affirmed the federal injunctive relief and agreed that "the uncontested evidence before [the court] is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders." 462 F.3d at 181. It described New York's judicial nominating system as "exclusionary and boss-dominated" and an "electoral practice 'that mocks choice,'" in which "voters can never know the candidates," while the "real choice is . . . left to political bosses . . . who control nominations." *Id.* (citations omitted). "Political leaders, not voters, control judicial conventions and decide who will receive the nomination — and thus who will be the judge." *Id.*

The president of the New York state bar association has decried "a system that rewards party loyalty over judicial ability" and "the taint of partisan politics in which should be an independent court system" – which have combined to breed "public cynicism and disrespect for the judicial process." Mark Alcott, *Picking Judges on the Merits*, N.Y. Times, Oct. 15, 2006, at 13. A blue-ribbon panel heard testimony that "parties 'dole out' judgeships as political patronage and that candidates must cater to their local political parties to have a chance at an elected position."[24] A four-year grand jury investigation into judicial corruption has produced guilty pleas and the conviction and resignation of a 12-term assembly member, deputy speaker, and Democratic party county chair. *See Deal in Brooklyn Corruption Case*,

[24] Report of Commission to Promote Public Confidence in Judicial Elections 19-20 (Feb. 6, 2006) (available at www.courts.state.us/reports).

N.Y. Times, Oct. 12, 2006, at B-3 (reporting "accusations that judgeships were being sold by party leaders, who have considerable influence over the nomination and election of judges"); *Legislature Is Split Over Methods to Nominate State Judges*, N.Y. Times, Feb. 28, 2006, at B-8 ("A Brooklyn judge who was arrested on corruption charges said the going rate for a Democratic nomination was about $50,000."); Dorothy Samuels, *Judges for Sale: How Special Interests Are Buying Up The Nation's Justice System.*, N.Y. Times, Dec. 14, 2006, at A-1.

Given the unconstitutional manner in which the Justices who sit in the Second Department were elected, it is particularly dangerous to permit an assignment system that operates in secret, without objective or neutral criteria. In today's climate of intense public scrutiny and criticism, it is imperative that the procedures of the state judicial system, including the appellate bench, be above reproach.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A: OPINION OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2005

(Argued: May 11, 2006 Decided: October 10, 2006)

Docket No. 05-5215-cv

Melvyn KAUFMAN,

Plaintiff-Appellant,

v.

Judith S. KAYE, in her capacity as Chief Justice of the Court of Appeals for the State of New York, A. Gail Prudenti, in her capacity as presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department,

Defendants-Appellees.

Before: WINTER, CABRANES, and RAGGI, Circuit Judges.

Appeal from dismissal of a complaint alleging that the procedure for assigning cases among panels of judges in the Appellate Division, Second Department violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We affirm on abstention grounds.

JONATHAN S. MASSEY (Stephen A. Saltzburg, Anthony Z. Roisman, Patrick J. Munson, Catherine A. Helwig, John M. Churnefsky, on the brief), National Legal Scholars Law Firm, for Plaintiff-Appellant.

BENJAMIN N. GUTMAN (Eliot Spitzer, Attorney General of the State of New York, Robert H. Easton, on the brief), for Defendants-Appellants.

WINTER, Circuit Judge:

Melvyn Kaufman appeals from Judge Trager's dismissal of his complaint, which brought an action under 42 U.S.C. § 1983. Kaufman alleges that the procedure for assigning appeals among panels of judges in New York's Second Department of the Appellate Division violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it permits court staff to assign cases to panels of judges on a non-transparent, discretionary basis.

Based on *O'Shea v. Littleton*, 414 U.S. 488 (1974), we affirm.

BACKGROUND

Because this is an appeal from a dismissal for failure to state a claim, we view the allegations of the complaint in the light most favorable to appellant. *Desiderio v. Nat'l Ass'n of Securities Dealers*, 191 F.3d 198, 202 (2d Cir.1999).

Kaufman alleges the following. He lives in Mamaroneck, New York, in a gated community called Edgewater Point. The Edgewater Point Property Owners' Association (the "EPPOA") imposes various covenants that run with the property, and Kaufman complies with them, as do most of his neighbors. However, he alleges that "there are newer property owners who have chosen to disregard the restrictive covenants." Compl. at 24. These new property owners "became wealthy during the recent period of corporate excess

and illegal financial schemes of the 1990's and purchased property in existing prestigious communities such as Edgewater Point as a validation of their heightened social status." *Id.* Nevertheless, they refuse to abide by the restrictive covenants, and the EPPOA "is unwilling to enforce the restrictive covenants against the non-complying property owners." *Id.* at 27.

Before bringing the present action, Kaufman had lost five cases in New York state court against various neighbors and entities in Mamaroneck. In these, he claimed that neighbors violated a covenant not to use homes in Edgewater Point for business purposes by renting out their house to tenants. *Kaufman v. Fass,* 302 A.D.2d 497, 756 N.Y.S.2d 247 (App.Div.2d Dept.2003). He also alleged that neighbors have allowed their parents to live rent-free in a house they owned in the community. *Kaufman v. Kehler,* 305 A.D.2d 636, 759 N.Y.S.2d 765 (App.Div.2d Dept.2003). He brought another action against Mamaroneck. *Kaufman v. Village of Mamaroneck,* 286 A.D.2d 666, 729 N.Y.S.2d 778 (App.Div.2d Dept.2001). He claimed that a neighbor defamed him. *Kaufman v. Farris,* 293 A.D.2d 654, 740 N.Y.S.2d 627 (App.Div.2d Dept.2002). Finally, he brought an action against the building inspector seeking revocation of building permits issued to neighbors who had submitted fraudulent applications. *Kaufman v. Office of Bldg. Inspector,* 295 A.D.2d 349, 743 N.Y.S.2d 880 (App.Div.2d Dept.2002).

After each case was dismissed in the trial court, Kaufman appealed to the Second Department of the New York Appellate Division. In the Second Department, Justice Gabriel M. Krausman and Justice Thomas A. Adams sat on four of the five panels hearing his appeals. Justice Stephen G. Crane sat on three of the five panels. Based on a statistical analysis, Kaufman claims that the assignment of judges to his cases was not random but "was intentional and not a mere accident, or coincidental." Compl. at 49. He also claims that Justices Krausman, Adams, and Crane "exhibited extreme

bias against" him, Compl. at 50, and that all of the panels that heard his appeals decided against him "[d]espite the strong factual and legal basis for overturning the orders of the court below." Compl. at 51. Kaufman sought review of *Kehler* and *Fass* in the Court of Appeals. Those requests were denied. He petitioned the Supreme Court of the United States for certiorari for review of *Fass*. That request was also denied.

Three further Kaufman-initiated cases were pending when the present complaint was filed. On appeal to the Second Department, all three were scheduled for argument on the same day, although they involved different defendants and different issues. Each ended unsuccessfully for Kaufman. In those appeals, Justice Adams was on each panel.

Kaufman also notes that a $10,000 sanction was imposed on him by the Second Department for pursuing a frivolous appeal. This fine was imposed, according to Kaufman, "because the panel was not neutral and was biased against [him]." Compl. at 65.

Kaufman's complaint sought: (i) a declaration that the system for assigning cases among panels of judges in the Second Department of the Appellate Division violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (ii) an injunction requiring the New York state legislature to establish a new system of assigning appeals in the Second Department; (iii) vacatur of a number of Second Department decisions adverse to Kaufman; and (iv) vacatur of sanctions the Second Department has imposed on him.

Judge Trager granted appellees' motion to dismiss the complaint. He held that Kaufman's request for reversal of previously rendered decisions of the Second Department was barred by the *Rooker-Feldman* doctrine, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and that his challenge to the Second Department's procedures failed because the federal Due Process Clause does not require

random assignment of judges. Judge Trager also noted that, if the cases were purposely assigned to particular justices, doing so was reasonable because "the justices know the underlying factors of the cases and can more quickly dispose of a plaintiff's motion." *Kaufman v. Kaye,* 2005 WL 1923561 at *4 (E.D.N.Y. 2005).

Kaufman brought the present appeal. Counsel for Kaufman explained at oral argument that he now seeks only a declaratory judgment that the non-transparent, non-random assignment procedures in the Second Department violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and an injunction requiring the State of New York to establish a new system for assigning appeals in the Second Department.

DISCUSSION

Even the relief now sought by Kaufman would be so intrusive in the administration of the New York court system that we must, based on applicable precedent, abstain. Under a controlling decision of the Supreme Court, federal courts may not entertain actions, like the present one, that seek to impose "an ongoing federal audit of state ... proceedings." *O'Shea v. Littleton,* 414 U.S. 488, 500 (1974). In *O'Shea,* the plaintiffs sought injunctive relief against the allegedly racially discriminatory administration of the criminal justice system in an Illinois county. *Id.* at 491-92. The Court held in part that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" would lead to the precise federal interference in state judicial proceedings that *Younger v. Harris,* 401 U.S. 37 (1971), was designed to prevent. 414 U.S. at 500.

In *Younger,* the Supreme Court had explained that, in our federal system, a federal court, "anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly

interfere with the legitimate activities of the States." 401 U.S. at 44. *Younger* was a challenge to an ongoing state criminal case, but the doctrine has been extended with equal force to federal civil litigation challenging certain other state proceedings. *Diamond "D" Const. Corp. v. McGowan,* 282 F.3d 191, 198 (2d Cir. 2002).

We have previously examined the role of federal courts in civil litigation challenging the internal workings of state courts. *See Wallace v. Kern,* 481 F.2d 621 (2d Cir. 1973) (*Wallace I); Wallace v. Kern,* 499 F.2d 1345 (2d Cir. 1974) (*Wallace II*); *Wallace v. Kern,* 520 F.2d 400 (2d Cir. 1975) (*Wallace III*). In these three related appeals, we rejected a series of attempts by the federal district court to impose new requirements and bail procedures on the New York State courts, for example, an injunction requiring the clerk of the state court to calendar all *pro se* motions filed by members of the plaintiff class, *Wallace I,* 481 F.2d at 622, and injunctions requiring evidentiary hearings and a written statement of reasons by the state judge for fixing bail. *Wallace III,* 520 F.2d at 403 (2d Cir. 1975). In so holding, we wrote that "under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Id.* at 405 (quoting *Wallace I,* 481 F.2d at 622 (2d Cir. 1973)). We observed that the federal courts cannot "legislate and engraft new procedures upon existing state criminal practices." *Id.* at 404. Such "interference with the state criminal process in both pending and future bail proceedings," *id.* at 405 n. 9, would violate principles of comity set forth in *Younger. Id.* at 408. Our sister circuits are in agreement. *See Parker v. Turner,* 626 F.2d 1, 8 (6th Cir. 1980) (reading *O'Shea* to require that federal courts exercise "near-absolute restraint" in "situations where the relief sought would interfere with the day-to-day conduct of state trials"); *Anthony v. Council,* 316 F.3d 412, 421 (3d Cir. 2003) (abstaining under *Younger* when federal relief would disrupt the New Jersey court system and lead to federal monitoring);

Joseph A. v. Ingram, 275 F.3d 1253, 1271 (10th Cir. 2002) (suggesting that federal oversight of state court operations would be a problem under *Younger*); *Pompey v. Broward County*, 95 F.3d 1543, 1548-49 (11th Cir. 1996) (observing that federal court rulings that ordered interventions in the state courts presented an unseemly encroachment on federalism and comity); *Luckey v. Miller*, 976 F.2d 673, 677-79 (11th Cir. 1992) (abstaining on *Younger* grounds because a federal order revamping the state's indigent defense system would inevitably interfere with state criminal proceedings); *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (noting in *dicta* that if a case threatened "interference with ongoing state proceedings or practices," then authorities like *O'Shea* might be applicable); *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988) (noting that "a federal court ruling on the practices and procedures of the municipal court system ... would require supervisory enforcement of the ruling by the federal courts" and that "[t]his type of monitoring of state court procedures ... offends principles of federalism").

We see little difference between the relief sought here and that sought in *O'Shea* and the decisions cited in the preceding paragraph. To be sure, as appellant argues, the relief he now seeks in the federal courts would, if granted, leave "the state judiciary ... free to craft a remedy in the first instance." Appellant's Reply Br. at 27. However, any remedy fashioned by the state would then be subject to further challenges in the district court. Appellant--or any state court litigant dissatisfied with the panel of judges assigned to his or her appeal--could raise compliance issues under the putative federal injunction claiming that the state court's chosen remedy violated the Constitution or the terms of that injunction. Such challenges would inevitably lead to precisely the kind of "piecemeal interruptions of ... state proceedings" condemned in *O'Shea*. In short, we cannot resolve the issues raised here as to present assignment procedures without

committing to resolving the same issues as to the remedy chosen by the state and as to the subsequent case-by-case implementation of the assignment procedures in the Second Department. This is exactly what *O'Shea* forbids.

Of course, as in *O'Shea,* Kaufman can raise his federal claims in the state proceedings and has in fact raised them in his prior cases. "[A]bstention is appropriate where the plaintiff has an 'opportunity to raise and have timely decided by a competent state tribunal' the constitutional claims at issue in the federal suit." *Spargo v. New York State Comm'n on Judicial Conduct,* 351 F.3d 65, 77 (2d Cir. 2003) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 437 (1982)). But abstention is inappropriate where "state law bars the effective consideration of [the] constitutional claims." *Spargo,* 351 F.3d at 78. Kaufman argues that he cannot obtain relief "under the same procedures [he] is now attacking as unconstitutional." Appellant's Reply Br. at 24. However, his response misunderstands the appropriate inquiry. We need ask only "whether the state's procedural remedies *could* provide the relief sought not whether the state *will* provide the constitutional ruling which the plaintiff seeks." *Spargo,* 351 F.3d at 79 (quotation marks, alterations, and citation omitted). Without question, the New York courts can consider the constitutional questions Kaufman raises and order relief if they deem them to have merit.

Moreover, if he is dissatisfied with the decisions of the Appellate Division, he may petition the New York Court of Appeals and the Supreme Court of the United States for review. *Id.* at 79 n. 14 (noting that abstention may still be "required even where only discretionary judicial review is available"). Kaufman makes no claim that the procedures of those tribunals are constitutionally suspect, and thus there is no reason to believe he cannot obtain any relief he deserves from them.

CONCLUSION

We conclude that federal courts must abstain from consideration of the claims Kaufman raises here, and we therefore affirm the dismissal of his complaint.[1]

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[1] "*Younger* is not a jurisdictional bar based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction grounded in equitable considerations of comity." *Spargo v. New York State Comm'n on Judicial Conduct,* 351 F.3d 65, 74 (2d Cir. 2003). However, we may resolve the case on *Younger* grounds without deciding whether Kaufman has constitutional standing, a jurisdictional requirement, under *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), because we may "dismiss an action on a non-merits ground before finding subject-matter jurisdiction." *Spargo,* 351 F.3d at 74; *see Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 585 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

APPENDIX B: OPINION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 11, 2005

United States District Court,
Eastern District of New York

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Melvyn KAUFMAN,

Plaintiff,

- against -

Civil Action No.
04-CV-3494
(DGT) (MDG)

Judith S. KAYE, in her capacity as Chief Justice of the Court of Appeals of the State of New York and A. Gail PRUDENTI, in her official capacity as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department,

Defendants.

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MEMORANDUM AND ORDER

TRAGER, J.

Plaintiff Melvyn Kaufman ("plaintiff") brought this suit against Judith S. Kaye, in her administrative capacity as Chief Judge of the Court of Appeals of the State of New York, and A. Gail Prudenti, in her official capacity as Presiding Justice of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (collectively "defendants"), seeking a declaration that the system by which appeals are assigned to justices in the Supreme Court of the State of New York, Appellate Division, Second Judicial

Department ("Second Department") violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Plaintiff also seeks an injunction requiring the New York State Legislature to establish a new system of assigning appeals in the Second Department. Plaintiff further seeks a judgment vacating the decisions and the Second Department's imposition of sanctions against him and directing a new hearing in each of his cases. Defendants move to dismiss plaintiff's claims for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). For the following reasons, defendants' motion is granted.

Background

Plaintiff is a resident of Mamaroneck, New York and lives in a gated community known as Edgewater Point. Complaint ("Compl.") ¶ 18. Edgewater Point properties are encumbered by a number of restrictive covenants, and the community is governed by a homeowner's association, the Edgewater Point Property Owners' Association ("EPPOA"), which enforces those covenants. *Id.* ¶¶ 19, 20. Plaintiff has lived in Edgewater Point for a number of years and has complied with the restrictive covenants, as have most of his neighbors. *Id.* ¶ 23.

According to plaintiff, in recent years, a number of properties have been sold to a new type of owner who have acquired wealth and influence "during the recent period of corporate excesses and illegal financial schemes." *Id.* ¶ 24. Plaintiff claims that his nouveau riche neighbors "decided that they were not bound by the restrictive covenants and could ignore them." *Id.* Initially, plaintiff requested that the EPPOA enforce the covenants because the property owners' non-compliance "negatively effected plaintiff and his properties." *Id.* ¶¶ 25, 26. When the EEPOA refused, plaintiff "commenced actions against both the EEPOA and other individual property owners on Edgewater Point who were violating the restrictive covenants." *Id.* ¶ 28. Plaintiff filed at

least seven complaints[1] in New York State Court against various of his neighbors and entities including the Village of Mamaroneck, the Office of Building Inspector and the State of New York. *Id.* ¶¶ 29, 93.

Plaintiff claimed that certain of his neighbors violated the restrictive covenant prohibiting the homes in Edgewater Point from being used for business purposes (1) by renting out their house to tenants, *see Kaufman v. Fass,* 302 A.D.2d 497, 756 N.Y.S.2d 247 (2003) and (2) by allowing their parents to live in a house they owned in the community rent-free. *See Kaufman v. Kehler,* 305 A.D.2d 636, 759 N.Y.S.2d 765 (2003). Plaintiff also claimed that one of his neighbors defamed him. *See Kaufman v. Farris,* 293 A.D.2d 654, 740 N.Y.S.2d 627 (2002). Plaintiff's claims against New York State, the Village of Mamaroneck and the Office of the Building Inspector alleged fraud and sought revocation of the building permits issued to his neighbors. *See Kaufman v. State of New York,* 18 A.D.3d 504, 794 N.Y.S.2d 665 (2005); *Kaufman v. Office of Bldg. Inspector,* 295 A.D.2d 349, 743 N.Y.S.2d 880 (2002). The New York Supreme Court dismissed each of these cases under N.Y. C.P.L.R. § 3211. *Id.* ¶ 31.

Plaintiff appealed each of these decisions and, in one case, filed two appeals. *Id.* ¶ 32, 93. Once plaintiff perfected[2] his appeals, the cases were assigned to four or five judge appellate panels in the Second Department. *Id.* ¶¶ 34, 41. Plaintiff claims that the selection of appellate panels were manipulated by certain justices so that they could sit on the

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[1] These cases were captioned *Kaufman v. Vill. of Mamaroneck* (2 cases apparently bore this caption), *Kaufman v. Office of Bldg. Inspector, Kaufman v. Farris, Kaufman v. Fass, Kaufman v. Kehler* and *Kaufman v. State of New York. See* Compl. ¶¶ 38, 93. According to his complaint, plaintiff also has a number of other cases pending in New York State Supreme Court. *See id.* ¶ 94.

[2] In New York State Court, an appellant perfects his appeal by filing a record on appeal and a brief. Compl. ¶ 36.

panels hearing plaintiff's appeals.[3] *Id.* ¶¶ 4, 49. Plaintiff further alleges that these justices were biased against him and wanted him to lose his appeals. *Id.* ¶¶ 49, 50, 81, 82. Plaintiff did, in fact, lose each of his appeals. *Id.* ¶ 52.

Plaintiff's allegations of bias appear to be based on the "inappropriate conduct that was exhibited by [the] Justices" during the oral arguments of two of plaintiff's appeals and the fact that plaintiff lost his appeals "[d]espite the strong factual and legal basis for overturning the orders of the court below." *Id.* ¶¶ 50, 51. During the arguments, plaintiff claims that the justices "made abusive and derisive comments specifically about plaintiff which were totally unrelated to the appeals and also made comments concerning the purported lack of merits of plaintiff's positions in the appeals." *Id.* ¶ 50. In addition, in one case, plaintiff was personally sanctioned in the amount of $10,000 for pursuing a frivolous appeal, which plaintiff claims was improperly imposed and is evidence of the justices' bias against him. *Id.* ¶¶ 53-66.

Plaintiff sought permission from the New York Court of Appeals to review the adverse decisions on two of his appeals and the decision to impose sanctions. *Id.* ¶ 67. The Court of Appeals denied plaintiff's requests. *Id.* Plaintiff also filed for a writ of certiorari with the United States Supreme Court in one of his cases, but the request was denied. *Id.* ¶ 69.

Plaintiff claims that the non-random assignment process in the Second Department and the justices' bias against him has deprived him of his due process right to a fair and impartial tribunal. Plaintiff seeks declaratory relief and an order compelling the Second Department to "adopt a public, random, neutral and transparent process for the assignment of

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[3] In his complaint, plaintiff points out that two justices, Justice Krausman and Justice Adams, sat on four of the five panels hearing his appeals and another justice, Justice Crane, sat on three of the five panels. *Id.* ¶ 47. Since plaintiff filed his complaint, three more of his appeals have been heard, and Justice Adams sat on each panel. *See* Letter from Patrick K. Munson (plaintiff's attorney) to the court, dated April 6, 2005.

appeals to the panels of justices which hear and determine appeals ... as required by the Constitution of the United States and the Code of Judicial Conduct of the State of New York." *Id.* ¶ 9.

Discussion

(1)

"The *Rooker-Feldman* doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment." *Hachamovitch v. DeBuono,* 159 F.3d 687, 693 (2d Cir. 1998). *Rooker-Feldman* applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.,* ___ U.S. ___, 125 S.Ct. 1517, 1521-22 (2005). *Rooker-Feldman* "requires that an aggrieved state court litigant must pursue his claims directly in the state appellate court and ultimately to the United States Supreme Court." *Thaler v. Casella*, 960 F.Supp. 691, 697 (S.D.N.Y. 1997) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923)). The Supreme Court also noted that a district court does not have jurisdiction where "allegations are inextricably intertwined" with the state court decision in dispute. *Id.*

In the case at bar, plaintiff's challenge to the process by which justices are assigned to hear cases is potentially distinguishable from his claims that the decisions rendered against him and the sanctions imposed should be vacated.

It is apparent that this court is without the power to overturn the Second Department's decisions or the sanctions against plaintiff. Also, plaintiff has only appealed two of his cases and the sanctions to the New York Court of Appeals and has only filed for a writ of certiorari with the Supreme

Court in one case. So long as an avenue for appeal exists in the state court and/or with the Supreme Court, the district court is certainly not the appropriate forum for plaintiff's claims. *Thaler,* 960 F.Supp. at 697. With regard to the decisions he has appealed, *Rooker-Feldman* clearly bars this court from reversing or modifying those decisions in any way. *Hachamovitch,* 159 F.3d at 693. For these reasons, plaintiff's requests to overturn the decisions of the Second Department in his cases are denied for lack of subject-matter jurisdiction.[4]

(2)

In *Feldman,* the Supreme Court drew a distinction between a general challenge to a rule and a challenge to a judgment applying the rule and held that a district court could have subject matter jurisdiction over the former. *Feldman,* 460 U.S. at 486. Therefore, this court does have jurisdiction over plaintiff's claim that the Second Department's assignment system generally violates due process because it is not random and can be manipulated. However, this claim must be dismissed on the merits. In a letter from James Edward Pelzer, the Clerk of the Court of the Second Department, the assignment process was described to the plaintiff thus:

---

[4] Even if this court had jurisdiction over plaintiff's claims, he has not sufficiently pled that his due process rights were violated. Plaintiff claims that the justices who repeatedly appeared on his panels were prejudiced against him and plaintiff was, therefore, deprived of his right to a fair and impartial tribunal. In order to be disqualifying, the bias alleged must stem from "non-juridical data," namely, a source outside of a judge's adjudicatory functions. *See N.Y. v. Moreno,* 70 N.Y.2d 403, 405, 521 N.Y.S.2d 663, 665, 516 N.E.2d 200 (1987). Plaintiff has not alleged that any of the judges knew anything about him or his claims outside his papers and the proceedings. Further, despite plaintiff's arguments to the contrary, comments critical of or even hostile to a party or a party's claims during a hearing do not alone support a challenge of bias. *Liteky v. U.S.,* 510 U.S. 540, 555 (1994).

> I make up the schedule of sittings that assigns the individual Justices to panels and assigns a Reserve Justice for each day to hand recusals and *ex parte* applications. This schedule is prepared some months in advance. Thereafter, the Chief Court Attorney assigns appeals to the established panels upon the completion of a confidential report by an attorney in our law department.

See Comp. ¶ 72. Plaintiff claims that the fact that cases are assigned to the specific panel only after the "confidential report" is issued is unconstitutional because it allows cases to be assigned to specific justices instead of being randomly assigned.

It has been repeatedly held that the random assignment of cases is not necessary to guarantee a party's rights. *Francolino v. Kuhlman,* 365 F.3d 137, 141 (2d Cir.2004) (finding that impartiality required by due process "does not depend on the manner in which [judge] was selected"); *U.S. ex rel Monty v. McQuillan,* 385 F.Supp. 1308, 1310 (E.D.N.Y.1974) ("[D]ue process does not accord ... a right to have a judge assigned to [a] case on a random basis."); *see also U.S. v. Simmons*, 476 F.2d 33, 35 (9th Cir. 1973) (holding that defendant did not have a right to random selection of a judge). "[A] defendant has no vested right to have his case tried before any particular judge, nor does he have the right to determine the manner in which his case is assigned to a judge." *Monty*, 385 F.Supp. at 1310. Therefore, the fact that the Second Department's method of assigning cases is not necessarily random does not render it unconstitutional.

Further, even if plaintiff's cases were purposely assigned to certain judges, the allocation of judges to related cases for the sake of judicial efficiency is a common and accepted practice. *See e.g.* E.D.N.Y. Local Rule 50.3. The assignment of a plaintiff's cases to certain justices is perfectly reasonable because the justices know the underlying facts of the cases

and can more quickly dispose of a plaintiff's motions. Therefore, the Second Department's assignment system does not violate due process.[5]

Conclusion

For the foregoing reasons, defendants' motion is granted and plaintiff's complaint is dismissed in its entirety. The Clerk of the Court is directed to close this case.

Dated: Brooklyn, New York
August 11, 2005

SO ORDERED:
_____/s/_____
David G. Trager
United States District Judge

[5] In a letter to the court dated April 6, 2005, plaintiff, through his attorney, sought permission to amend his complaint in order to add factual allegations in further support of his claims. *See* Letter from Patrick K. Munson (plaintiff's attorney) to the Court, dated April 6, 2005. Plaintiff claims that Justice Adams appeared on the panels for three more of plaintiff's appeals. As a non-random assignment of cases does not, without more, violate due process, any amendment would be futile, and permission to amend is, therefore, denied.

APPENDIX C: AMENDED JUDGMENT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 24, 2005

United States District Court,
Eastern District of New York

----------x

Melvyn KAUFMAN,

Plaintiff,

- against -

AMENDED JUDGMENT
04-CV-3494 (DGT)

Judith S. KAYE, in her capacity as Chief Justice of the Court of Appeals of the State of New York and A. Gail PRUDENTI, in her official capacity as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department,

Defendants.

----------x

A Memorandum and Order of Honorable David G. Trager, United States District Judge, having been filed on August 11, 2005, granting in part defendants' motion to dismiss for lack of subject matter jurisdiction; denying defendants' motion to dismiss for lack of subject matter jurisdiction with respect to plaintiff's claim that the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department's assignment system violates due process over which the Court has jurisdiction and dismisses such claim on the merits; and dismissing plaintiff's complaint in its entirety; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; that defendants' motion to dismiss is granted; and that plaintiff's complaint is dismissed in its entirety.

DATED: Brooklyn, New York
August 24, 2005

Robert C. Heinemann
Clerk of Court

By: _____
Terry Vaughn
Chief Deputy Clerk
for Operations

OPPOSITION BRIEF

(2)

No. 06-934

FILED
FEB 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MELVYN KAUFMAN,

Petitioner,

v.

JUDITH S. KAYE and A. GAIL PRUDENTI,
in their official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), the lower federal courts should abstain from hearing an unsuccessful state-court litigant's collateral challenge to the procedures by which a state court assigns its judges to appellate panels?

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STATEMENT

1. Petitioner lives in a gated community in Westchester County, New York (2d Cir. App. A10). Starting in 2000, he launched a campaign of litigation in state court against his neighbors and governmental entities alleging property-related and defamation claims under state law. The various cases involved overlapping parties, factual circumstances, and legal theories.[1] In each case, after the state trial court dismissed petitioner's claims, he appealed to the intermediate appellate court — the Appellate Division of the Supreme Court of New

---

1. *See Kaufman v. Vill. of Mamaroneck*, 286 A.D.2d 666, 729 N.Y.S.2d 778 (2d Dep't 2001) (claim for damages from the village's grant of a building permit to petitioner's neighbor), *leave denied*, 98 N.Y.2d 602, 771 N.E.2d 835 (2002); *Matter of Kaufman v. Office of Bldg. Inspector*, 295 A.D.2d 349, 743 N.Y.S.2d 880 (2d Dep't 2002) (mandamus petition regarding the same building permit); *Kaufman v. Farris*, 293 A.D.2d 654, 740 N.Y.S.2d 627 (2d Dep't 2002) (defamation claim against a neighbor), *leave denied*, 99 N.Y.2d 505, 785 N.E.2d 733 (2003); *Kaufman v. Fass*, 302 A.D.2d 497, 756 N.Y.S.2d 247 (2d Dep't) (claim against neighbors for violating a restrictive covenant by leasing their house to a long-term tenant), *leave denied*, 100 N.Y.2d 512, 798 N.E.2d 350 (2003), *cert. denied*, 540 U.S. 1162 (2004); *Kaufman v. Kehler*, 305 A.D.2d 636, 759 N.Y.S.2d 765 (2d Dep't) (claim against a neighbor for violating restrictive covenant by permitting her parents to live rent-free in her home), *leave denied*, 1 N.Y.3d 504, 807 N.E.2d 893 (2003); *Kaufman v. State*, 18 A.D.3d 503, 795 N.Y.S.2d 280 (2d Dep't) (suit alleging damages to petitioner's property), *leave denied*, 5 N.Y.3d 709, 836 N.E.2d 1153 (2005); *Kaufman v. State*, 18 A.D.3d 504, 794 N.Y.S.2d 665 (2d Dep't) (suit seeking leave to file a late claim against the State for damages to petitioner's property), *leave denied*, 5 N.Y.3d 709, 836 N.E.2d 1153 (2005); *Kaufman v. Vill. of Mamaroneck*, 18 A.D.3d 505, 794 N.Y.S.2d 669 (2d Dep't) (suit against the village for damage to petitioner's property), *leave denied*, 5 N.Y.3d 709, 836 N.E.2d 1153 (2005).

York, Second Department. In each of the appeals at issue here, a four-judge panel of the Second Department affirmed the dismissal, and in one, *Kaufman v. Kehler*, the court fined petitioner $10,000 for persisting to litigate frivolous claims (2d Cir. App. A17-20).

Petitioner never filed a motion in the Second Department seeking the recusal of particular judges or asking that his appeals be reassigned to different appellate panels. On five occasions, however, he sought further discretionary review from the New York Court of Appeals, arguing — among other thing — that the Second Department's panel-assignment procedures are unconstitutional. In each instance, the court denied (or dismissed on procedural grounds) the discretionary motion for leave to appeal.[2] Petitioner also challenged the Second Department's procedures in a petition for a writ of certiorari, which this Court denied. *See* Petition for Writ of Certiorari at i, *Kaufman v. Fass*, 540 U.S. 1162 (2004) (No. 03-798).

2. Having lost on direct appeal, and while state-court proceedings were still pending in *Kaufman v. State*, *Kaufman v. Village of Mamaroneck*, and *Kaufman v. Kehler*, petitioner sued respondents — the chief judge of the New York Court of Appeals and the presiding justice of the Second

2. *See* Motion for Leave to Appeal ¶¶ 55-72, *9394 LLC v. Farris*, 4 N.Y.3d 705, 827 N.E.2d 284 (2005) (Motion No. 12); Motion for Leave to Appeal ¶¶ 89-100, *Kaufman v. Kehler*, 1 N.Y.3d 504, 807 N.E.2d 893 (2003) (Motion No. 1124); Motion for Leave to Appeal ¶¶ 44-76, *Kaufman v. Fass*, 100 N.Y.2d 512, 798 N.E.2d 350 (2003) (Motion No. 896); Motion for Leave to Appeal ¶¶ 85-98, *Kaufman v. Kehler*, 799 N.E.2d 619 (2003) (Motion No. 802); Motion for Leave to Appeal ¶¶ 53-73, *Kaufman v. Kehler*, 100 N.Y.2d 614 (2003) (Motion No. 694).

Department — in federal district court. In his complaint, he alleged that the Second Department's panel-assignment procedures violate due process and equal protection because they create an opportunity for the clerk's office to assign particular cases to particular judges (2d Cir. App. A23). Of the four panels that had heard petitioner's first five Second Department appeals — two appeals were set for argument before a single panel, *see* 22 N.Y.C.R.R. § 670.7(c)(2) (providing that related cases may be set for argument before a single panel even if they have not been formally consolidated) — two judges (Justices Krausman and Adams) each sat on three of the panels, and a third (Justice Crane) sat on two. Based on this pattern, petitioner alleged that the panel assignments were the result of deliberate "manipulation" by the Second Department clerk's office (2d Cir. App. A6). He also pleaded that Justices Krausman, Adams, and Crane were biased against him because of their comments at the oral arguments, which suggested that his legal arguments lacked merit (2d Cir. App. A16).

By way of relief from the federal district court, petitioner sought new appellate hearings in his first five appeals, vacatur of the sanctions imposed against him in *Kehler*, and an injunction requiring the New York Legislature (which had not been named as a defendant) to establish within ninety days a new system for assigning appeals in the Second Department (2d Cir. App. A33-34). He also sought a declaration that the current assignment system is unconstitutional (2d Cir. App. A32).

The district court granted respondents' motion to dismiss (Pet. App. 19a). The court held that to the extent petitioner's claims were predicated on — and sought to reopen — his past Second Department appeals, they were barred by the

Rooker-Feldman doctrine, which precludes lower federal courts from exercising appellate review over state-court judgments (Pet. App. 15a). And to the extent that he was mounting a facial challenge to the Second Department's practices, petitioner failed to state a claim upon which relief could be granted (Pet. App. 15a). As the court explained, "random assignment of cases is not necessary to guarantee a party's rights" and "even if plaintiff's cases were purposely assigned to certain judges, the allocation of judges to related cases for the sake of judicial efficiency is a common and accepted practice" (Pet. App. 16a).

On appeal to the Second Circuit, petitioner tried to avoid the *Rooker-Feldman* bar by limiting his claim to declaratory relief and an injunction ordering respondents to develop a new panel-assignment system (Pet. App. 5a). The Court of Appeals nonetheless unanimously affirmed dismissal of the complaint based on the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny (Pet. App. 5a). It saw "little difference between the relief sought here and that sought in" *O'Shea v. Littleton*, 414 U.S. 488 (1974), and many other federal cases from which the courts ha[illegible] abstained (Pet. App. 7a). And petitioner would have ample opportunity to raise his federal constitutional claims in any ongoing state proceedings or by petitioning this Court for a writ of certiorari to the state courts (Pet. App. 8a).

Petitioner did not seek rehearing before the en banc Court of Appeals.

REASONS FOR DENYING THE PETITION

The decision below dismissing petitioner's claims under *Younger* abstention is a straightforward application of this Court's precedent. *Younger* requires the lower federal courts to abstain from deciding claims that might entangle the federal courts in the day-to-day management of state-court litigation; such claims are subject to federal review only through a direct petition for certiorari to the state courts. Petitioner's claims fall within the heartland of *Younger* because they ask the lower federal courts to supervise the Second Department's panel-assignment practices. The decision below does not conflict with the decisions of any other federal Court of Appeals or otherwise present an issue that merits this Court's attention. Moreover, this case would be a poor vehicle for deciding the issues petitioner seeks to raise, because his claims are now moot and his complaint does not state a cognizable claim in the first place.

1. The Court of Appeals' decision to abstain from hearing petitioner's challenge to the Second Department's panel-assignment procedures was virtually compelled by this Court's holding in *O'Shea*, and it is consistent with the decisions of other lower federal courts on analogous facts.[3] In *O'Shea*, the plaintiffs alleged a pattern of racial

3. *See, e.g.*, *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992) (holding that the federal courts must abstain from hearing claims that sought structural reforms of Georgia's indigent defense system); *Wallace v. Kern*, 520 F.2d 400, 404-09 (2d Cir. 1975) (abstaining from hearing a challenge to state-court bail practices); *Miller v. Silbermann*, 951 F. Supp. 485, 492-93 (S.D.N.Y. 1997) (abstaining from hearing claim that housing court judges are biased against landlords, in part because bias claims could be litigated at some point in the state proceedings).

discrimination in various aspects of the criminal-justice system, including bond-setting, sentencing, and jury-fee assessments. 414 U.S. at 491-92. This Court explained that abstention was warranted, notwithstanding the serious nature of the allegations, because the plaintiffs were seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. That would require "nothing less than an ongoing federal audit of state criminal proceedings" that would be inconsistent with *Younger*. *Id.* Given the availability of other avenues of review (including direct appeal) to correct the constitutional violations the plaintiffs alleged and the "abrasive and unmanageable intercession which the injunctive relief they seek would represent," this Court concluded that abstention was required. *Id.* at 504.

As in *O'Shea*, the remedy petitioner sought here would inevitably entangle the federal courts in the day-to-day management of state-court litigation. He asked the lower federal courts to oversee the Second Department's panel-assignment procedures in pending and future appeals. To monitor the Second Department's compliance with their orders, the federal courts would have had to impose intrusive reporting requirements on the state court — reports that, as this Court noted in *O'Shea*, are "antipathetic to established principles of comity." *Id.* at 501. Both when he filed his federal complaint and when his appeal was briefed to the Court of Appeals, petitioner was involved in ongoing litigation in the Second Department. Petitioner thus could have raised his constitutional claims in those ongoing proceedings; the state courts had neither passed on the merits of his claims nor precluded him from raising them. And if petitioner wanted federal review, he could have petitioned

this Court for a writ of certiorari directly to the state courts, as he did — unsuccessfully — in one case.

Petitioner's primary contention is that the decision below conflicts with *Gerstein v. Pugh*, 420 U.S. 103 (1975), a case petitioner did not even mention in his briefs below and cited only in passing in a post-argument letter to the federal Court of Appeals. But *Gerstein* — unlike this case — did not threaten to entangle the federal courts in the day-to-day management of state-court proceedings, because the act challenged as unconstitutional was wholly collateral to the state-court proceedings. In *Gerstein*, the plaintiffs challenged pretrial detention of criminal defendants without an indictment or a probable-cause hearing. 420 U.S. at 105. Detention is not an integral part of adjudicating a case; thus, a constitutional challenge to detention would not require the lower federal courts to interfere directly with the state courts' adjudicatory acts. As this Court recognized, a ruling that affected pretrial detention would not be "directed at the state prosecutions as such"; the constitutionality of the detention procedures "could not be raised in defense of the criminal prosecution"; and federal-court orders requiring additional procedures "could not prejudice the conduct of the trial on the merits." *Id.* at 108 n.9; *see also Moore v. Sims*, 442 U.S. 415, 431 (1979) (explaining that in *Gerstein* "the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves").

Here, by contrast, a federal ruling striking down the Second Department's panel-assignment procedures would be directed at the state-court proceeding as such; the constitutionality of the procedures can be raised in state court as a basis for reconsidering or reversing the court's decision on appeal; and a federal-court order requiring different

procedures would interfere with the Second Department's ability to decide appeals on the merits. *Gerstein* thus is fully consistent both with *O'Shea* and with the decision below.[4]

Petitioner cites other cases in which this Court has passed on the constitutionality of state-court procedures, Pet. at 10 n.9, 15 n.11, but those cases confirm, rather than contradict, the decision below. With the exception of one federal habeas proceeding — *Smith v. Robbins*, 528 U.S. 259, 262 (2000) — every one of those cases was decided on certiorari to a state court. *See Holmes v. South Carolina*, 126 S. Ct. 1727 (2006); *Deck v. Missouri*, 125 S. Ct. 2007 (2005); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Testa v. Katt*, 330 U.S. 386 (1947); *Tumey v. Ohio*, 273 U.S. 510 (1927). Those cases

4. The other cases cited in the petition at 14-17 — most of which do not even mention *Younger*, *O'Shea*, or abstention — also involved challenges to procedures collateral to state-court adjudication. Like *Gerstein*, two of the cases involved pretrial detention. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991); *Fernandez v. Trias Monge*, 586 F.2d 848, 851 (1st Cir. 1978). In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), the plaintiffs challenged the advertising restrictions on lawyers contained in the State Bar Code. But even though those rules had been promulgated by the state supreme court, this Court explained that "propounding the Code was not an act of adjudication but one of rulemaking," *id.* at 731, and thus a decision invalidating those rules could not have interfered with the state court's adjudicatory responsibilities. *Stewart v. Abraham*, 275 F.3d 220, 225 (3d Cir. 2001), involved the district attorney's re-arrest policy, which — like pretrial detention — did not involve adjudicatory acts. And *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972) — which dealt with the role of probation officers in a family court's intake procedures — predated this Court's decision in *O'Shea* and thus is of little value here.

thus show that the constitutionality of state-court procedures should be decided by this Court on direct appeal from state court (or, in criminal cases, by the federal courts through habeas petitions) rather than through a separate lawsuit against state-court judges in the lower federal courts.

2. The other purported circuit splits that petitioner identifies are not implicated by the decision below.

a. The Court of Appeals' decision does not conflict with the cases holding that *Younger* abstention applies only where there are pending state-court proceedings. Here, petitioner candidly admits that "he was involved in pending Second Department litigation when the federal complaint was filed." Pet. at 19 n.14. He also represented to the court below that he still was involved in litigation in the Second Department at that time. *See* 2d Cir. Reply Br. at 28 ("Appellees do not accurately describe the procedural posture of Plaintiff's litigation. Plaintiff is still involved in two pending proceedings in the Second Department: *Kaufman v. Kehler*, Index No. 18099/01, and *9394 LLC v. Kehler*, Index No. 9307/02.").

Without question, *Younger* applies here because petitioner's state-court proceedings were pending when he filed his federal complaint, throughout the litigation in the district court, and at the time he briefed his federal appeal. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (explaining that the relevant question is whether there were state-court proceedings pending "at the time the federal complaint is filed"); *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (*Younger* did not apply because "any pending state proceedings . . . ended prior to her filing this lawsuit"); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975)

(*Younger* did not apply because "[n]o state proceedings were pending . . . at the time the District Court issued its preliminary injunction").

None of the cases petitioner cites, Pet. at 19-22 & nn.15 & 16, contradicts this rule. While there is dicta in *Edwards v. Illinois Board of Admissions to the Bar*, 261 F.3d 723 (7th Cir. 2001), and *Greening v. Moran*, 953 F.2d 301 (7th Cir. 1992), suggesting that *Younger* would not apply if the state-court proceedings had ended by the time of the appellate court's decision, in those cases the court ultimately dismissed the complaint on other threshold grounds. Thus, petitioner has not raised a genuine circuit split on this issue.

b. Nor is there any conflict with decisions suggesting that *Younger* does not apply where the state court has foreclosed the plaintiff from bringing his federal claim in the ongoing state proceedings, because here, the state courts have not foreclosed review of petitioner's federal claims. *See* Pet. at 18-19. Petitioner has never raised a challenge to the Second Department's panel-assignment system in the Second Department, and both the New York Court of Appeals and this Court have denied discretionary review of that claim without opining on the merits. *See People v. Rodriguez*, 91 N.Y.2d 912, 912, 692 N.E.2d 125, 125 (1998) (explaining that, like denial of certiorari, "denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value"). Petitioner could have raised his constitutional arguments in his state cases pending at the time he filed his federal lawsuit, and he remains free to make those arguments in any future state-court proceedings.

The Court of Appeals did not impose a general exhaustion requirement. *See* Pet. at 25-26. Rather, by

satisfying itself that petitioner would have an opportunity to challenge the Second Department's procedures in the course of ongoing state proceedings, the Court of Appeals merely ensured that federal abstention would not deprive him of a forum for his constitutional claims. Thus, the decision below is consistent with the cases holding that exhaustion is not required for claims under 42 U.S.C. § 1983. The decision below reflects only that *Younger* abstention might be inappropriate if the underlying federal claims could not be raised in state court, a proposition that petitioner explicitly endorses. *See* Pet. at 19.

c. Contrary to petitioner's assertion, Pet. at 23, *Younger* abstention is not limited to situations in which the federal-court plaintiff is nominally a defendant in state court. *See, e.g., Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1360 n.8 (9th Cir. 1986) (applying *Younger* abstention even though the federal plaintiff was nominally a plaintiff in state court as well). Nor is there any coherent reason to draw such a line. When the federal plaintiff seeks to have the lower federal courts oversee the management of state-court proceedings, the principles of comity that underlie *Younger* are offended regardless of the plaintiff's formal role in the state proceedings. Here, for example, petitioner's constitutional claims challenge appellate procedures that have nothing to do with whether he was a plaintiff or a defendant in the underlying actions. Although he had been a plaintiff in each of those actions, petitioner as easily could have been a defendant in one of them. His constitutional claims would be the same, and abstention would be equally warranted either way.

The cases cited by petitioner to support a rigid rule that the federal-court plaintiff must be a state-court defendant,

Pet. at 22-24 & nn.17 & 18, actually stand for a narrower proposition: that abstention is not appropriate when the plaintiff merely files parallel claims in state and federal court seeking the same relief. *See, e.g., Nader v. Keith*, 385 F.3d 729, 732 (7th Cir. 2004) (abstention not warranted when plaintiff "merely is pursuing parallel remedies" in state and federal courts); *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004) (abstention not required "merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts"); *Rogers v. Desiderio*, 58 F.3d 299, 301 (7th Cir. 1995) (Plaintiff "had free choice between federal and state court. Its federal suit is not designed to interfere with or undercut the state case . . . ."); *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 29 (6th Cir. 1984) (refusing to abstain in the face of parallel state and federal claims by prison inmates seeking similar relief); *Family Div. Trial Lawyers of the Super. Ct. — D.C., Inc. v. Moultrie*, 725 F.2d 695, 702 (D.C. Cir. 1984) (*Younger* should not be applied to "prevent plaintiffs from exercising their traditional choice of bringing constitutional claims in either forum" when plaintiffs have no state-court proceeding pending).

Those cases are consistent with both *Younger* and the decision below. When the plaintiff simultaneously seeks parallel remedies for the same harm in state and federal courts, the federal lawsuit does not threaten to entangle the lower federal courts in the day-to-day operation of the state courts. At most, the federal lawsuit might — through doctrines of preclusion — cause the state court to dismiss the state lawsuit before reaching the merits. By contrast, where — as here — a lower federal court is asked to undertake "meticulous and burdensome federal oversight of state court or court-like functions," it should abstain. *Wexler*, 385 F.3d at 1340.

3. This case does not involve any significant issues of federal law. While petitioner cites the Federal Courts Improvement Act of 1996, *see* Pet. at 28, he makes no effort to identify that law's relevance to this case. Nor does *Lopez Torres v. New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006), *petition for cert. pending*, No. 06-766, have any relevance here. That decision struck down part of New York's system for electing judges, but had nothing to do with the procedure for assigning judges to hear cases. The method of electing judges is a question of state election law. It does not implicate *Younger* abstention because, unlike assigning appellate panels, it is not part of the adjudicatory function of the state courts. Regardless of whether New York's election system is ultimately upheld, the system for judicial elections will have no impact on the procedures for individual appellate panel assignments. While the question of how a court selects appellate panels may be important, the route to challenge those procedures is through a direct petition for certiorari — which petitioner has sought and which this Court thus far has declined to grant.

4. In any event, this case would be a poor vehicle for clarifying the scope of *Younger* abstention, because petitioner's claims appear to be moot and his federal complaint does not even state a valid claim.

a. Petitioner's representations to this Court suggest that there is no longer a live case or controversy between the parties within the meaning of Article III, section 2. The Court of Appeals did not have to reach the jurisdictional issue, because it dismissed the complaint on other threshold grounds (Pet. App. 9a n.1). *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) ("courts do not overstep Article III limits when they . . . abstain under *Younger v. Harris*

without deciding whether the parties present a case or controversy" (citation omitted)). The jurisdictional question itself involves well-settled doctrinal principles whose application would not warrant this Court's attention. Thus, if this Court were to take this case to decide the *Younger* issues, it likely would end up dismissing the petition as improvidently granted. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 657-58 (2003) (Stevens, J., concurring) (explaining that certiorari was improvidently granted in view of serious jurisdictional questions).

Petitioner concedes — as he must — that he cannot obtain relief that would benefit him personally, because the *Rooker-Feldman* doctrine prevents the lower federal courts from reopening any of his completed state-court proceedings. He also informs this Court that he is not currently involved in any pending state-court proceedings. Pet. at 19. The case is thus moot, as petitioner faces no real prospect of injury from the Second Department's panel-assignment procedures in the future.

It is sheer speculation that petitioner will be enmeshed in future litigation in state court, that the litigation will lead to an appealable order, that an appeal will be taken to the Second Department, and that the appeal will be fully briefed and submitted. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III requires that the plaintiff face an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" (quotation marks omitted)). At present, petitioner stands in the same position as any other resident of suburban New York City who might desire prophylactic declaratory or injunctive relief governing the Second Department's procedures simply because he might someday bring an appeal

in that court. As is the case with respect to every other resident of New York, petitioner does not have a personal stake in the outcome of this litigation.

Petitioner incorrectly asserts that his case falls within the mootness exception for situations that are capable of repetition yet evading review. Pet. at 19 n.14. That exception, which is for injuries that are by their nature transitory, does not apply here. The federal claim will not evade review, because petitioner has ample opportunity to raise his claims in the state courts and to seek review of those claims on direct appeal to this Court. While it may seem to petitioner that his attempts to have his federal claim heard in federal court are thwarted at every turn — by *Rooker-Feldman*, *Younger*, and now mootness — that is only because petitioner stubbornly refuses to follow the proper procedure for seeking federal-court review of claims challenging the constitutionality of internal state-court adjudicatory procedures.

b. This case also is a poor vehicle for deciding the question presented because petitioner's underlying constitutional arguments fail to state a valid claim. The court of appeals properly declined to reach the merits of petitioner's claims, because it affirmed dismissal of the complaint on abstention grounds. But even if this Court were to reverse on the question of *Younger* abstention, that holding would make no difference to the ultimate outcome of the case. And as noted above, this Court has already refused to take up petitioner's claim on the merits by denying certiorari in *Kaufman v. Fass*.

Due process guarantees litigants an impartial judge — one who is not biased due to a personal or financial conflict of interest. *See, e.g.*, *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993). But the

lower federal courts that have confronted the issue have uniformly held that due process does not require random selection of appellate-court judges. And petitioner's complaint does not allege that the Second Department assigned judges based on race or some other unconstitutional criteria.[5]

For example, the Ninth Circuit rejected the argument that it is unconstitutional to handpick out-of-circuit judges to hear an appeal in which all of the circuit judges are recused. *United States v. Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989) ("We see no constitutional reason why cases could not be assigned, for example, on the basis of a judge's expertise. This is not to say that a random system may not be fair or desirable; it is only to say that appellant has not shown that anything less violates the Constitution."). Similarly, a district court in the Seventh Circuit rejected a due-process challenge to a procedure under which "protracted, difficult or widely publicized cases" would be assigned to a hand-picked judge instead of randomly. *United States v. Keane*, 375 F. Supp. 1201, 1203 (N.D. Ill. 1974) (internal quotation marks omitted), *aff'd in relevant part*, 522 F.2d 534, 557 (7th Cir. 1975); *see also People v. Hattery*, 183 Ill. App. 3d 785, 801-02, 539 N.E.2d 368, 379-80 (1989) (same); *Dancer v. State*, 715 P.2d 1174, 1177 n.1 (Alaska Ct. App. 1986) (characterizing as "frivolous" the argument for random selection of criminal judges). Notably, all of these cases were criminal rather than civil in nature, and thus involved greater due-process considerations than the civil lawsuits upon which petitioner based his challenge.

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5. Because this case was decided on a motion to dismiss, respondents do not at this stage dispute petitioner's allegation that the Second Department deliberately assigned his appeals to the same judges. But in fact — and notwithstanding petitioner's flawed statistical analysis — his appeals were assigned randomly.

Indeed, it is not uncommon for a court to forego random selection of judges. For example, a court may direct that one panel hear all appeals involving the same dispute[6] or all cases raising a particular issue.[7] Some procedural rules even allow one of the litigants to select the judge who will decide a matter. *See, e.g.*, Sup. Ct. R. 22(4) (a party seeking emergency relief in this Court may, after an unsuccessful application to the designated circuit justice, renew the application to any other individual justice of the party's choosing).

All of these practices result in deliberate assignment of an appeal to a particular panel or judge — because of the judges' familiarity with the facts or legal issues, in the interest of judicial economy, or for any other reason. But the practices, some of which are functionally no different from what petitioner alleges the Second Department to have done here, have never been held to violate due process. The district court therefore correctly dismissed petitioner's claims for failure to state a claim. Should this Court wish to decide the abstention issues petitioner raises, it would find itself with a case in which the underlying claims do not have enough merit even to survive a motion to dismiss.

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6. *See, e.g., United States v. Infante*, 404 F.3d 376, 395 (5th Cir. 2005); *United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 171 (2d Cir. 2003).

7. *See, e.g., A.R. ex rel. R.V. v. N.Y. City Dep't of Educ.*, 407 F.3d 65, 68 (2d Cir. 2005); *Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 574 (7th Cir. 2004); *Blair v. Equifax Check Servs.*, 181 F.3d 832, 839 (7th Cir. 1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MELVYN KAUFMAN,
Petitioner,

v.

JUDITH S. KAYE AND A. GAIL PRUDENTI,
IN THEIR OFFICIAL CAPACITIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Defendants' Brief in Opposition ("BIO") asserts that this case involves "a straightforward application" of the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). The Petition for Writ of Certiorari (Pet.) demonstrates that the Second Circuit's decision is anything but routine. It will bar virtually all federal challenges to the procedures of state courts, and it conflicts with precedent of this Court and of other courts of appeals. Defendants' own arguments unwittingly demonstrate the need for certiorari.

1. Defendants insist that the Court of Appeals' judgment is consistent with *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), because the remedy sought here supposedly would "entangle the federal courts in the day-to-day management of state-court litigation," BIO 5, and "would be directed at the state-court proceeding as such." BIO 7. These conclusory assertions are simply wrong.

First, there is no possibility that the remedy in this case would interfere with any act of *adjudication* by a state court. It is undisputed that the Second Department's case assignment procedure is not operated by state-court *judges* at all. A22 (Second Department's own website); A21 (letter from Clerk of Second Department). Instead, it is an *administrative process* operated by a court *staff attorney*, operating in secret, with unfettered discretion and *no independent judicial oversight*. Pet. 3. Thus, the assignment system is comparable to the pretrial detention procedure at issue in *Gerstein*, which similarly operated administratively, without the direct participation of a state judicial officer. 420 U.S. at 107-08.

Moreover, like the detention procedure at issue in *Gerstein*, the Second Department's case assignment system is wholly separate from the proceedings on the merits in an appeal. As Defendants concede, "petitioner's constitutional

claims challenge appellate procedures that have nothing to do with whether he was a plaintiff or defendant in the underlying actions." BIO 11. And Defendants further concede that *Younger* does not bar "challenges to procedures collateral to state-court adjudication." BIO 8 n.4. Petitioner's attack on the case assignment system is just such a "collateral" issue because it is unrelated to the fraud, nuisance, property, defamation, and other state-law claims involved in the state court cases. The relief sought — a declaration that the assignment procedure operated by the court staff attorney is unconstitutional — will not affect the disposition of any state-court case and is not directed at "the state-court proceeding as such." BIO 7. In fact, the case assignment process is analogous to the judicial selection procedure at issue in *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (CA2 2006), petition for cert. pending, No. 06-766, which Defendants acknowledge "does not implicate *Younger* abstention because . . . it is not part of the adjudicatory function of the state courts." BIO 13. Defendants' concessions demonstrate that the Second Circuit's sweeping ruling cannot be reconciled with this Court's decisions or with precedent in other circuits.

There is no basis for any suggestion that Petitioner seeks federal "day-to-day management" of state-court litigation, as in *O'Shea*. BIO 5, 7. Petitioner attacks the assignment system *on its face*, not its day-to-day operation. Defendants do not dispute that *O'Shea* involved the entirely distinct context of a *case-by-case* attack on the particular *applications* of state-court procedures that were concededly valid on their face. Petitioner stressed in the Second Circuit that he sought "only a declaratory judgment holding the Second Department's assignment policy unconstitutional." Reply Br. 22; *see also id.* at 26 (Petitioner seeks "only declaratory relief"); *id.* at 31 (conceding that injunctive relief would be unavailable against Defendants under 42 U.S.C. § 1983 on grounds of immunity and repeating that "Plaintiff seeks only

declaratory relief"). Petitioner also made clear that he did not ask the federal courts to decree any particular procedure as a replacement: "there are many constitutionally adequate alternatives that meet Plaintiff's standard." *Id.* at 3. "[T]he state judiciary would be free to craft a remedy in the first instance." *Id.* at 27. Defendants' speculation that a federal court might someday need to enforce declaratory relief with "intrusive reporting requirements," BIO 6, is premature, assumes that Defendants would not comply with a federal declaration, and provides no basis for denying even a partial remedy. After all, Defendants do not dispute that Congress, in enacting the Federal Courts Improvement Act of 1996, specifically reaffirmed the power of federal courts to issue declaratory relief against state judiciaries, even though injunctive relief may be unavailable. Pet. 28.

2. Defendants accuse Petitioner of "stubbornly refus[ing] to follow the proper procedure" of raising his constitutional claims in state court. BIO 15. But the undisputed fact is that Petitioner *did* raise his claims on *six* prior occasions in state court, and the state courts refused to grant relief every time. Pet. 7, 18-19.[1] The only "stubborn[ness]" displayed in this case was the state courts' persistent refusal to correct their unconstitutional system. The Second Circuit's decision therefore conflicts with precedent in other circuits opining that *Younger* does not apply where state courts are "unable or unwilling to correct continuing unconstitutional conduct." *Parker v. Turner*, 626 F.2d 1, 10 (CA6 1980).

Defendants contend that Petitioner "could have raised his constitutional arguments in his state cases pending at the time he filed his federal lawsuit." BIO 10. But Defendants do not explain how he could have done so effectively. Defendants

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[1] Defendants' assertion that "Petitioner has never raised a challenge to the Second Department's panel-assignment system in the Second Department," BIO 10, ignores the undisputed fact that Petitioner did so by letter to the Presiding Justice dated December 22, 2003. A43.

do not deny that if Petitioner had sought the recusal of individual appellate judges or had moved to have his appeals reassigned, any reassignments would have taken place under the same unconstitutional policy he was challenging. Pet. 25. Nor do Defendants explain how Petitioner could possibly have attacked, in advance, the irregular and unpredictable acts of manipulation (such as the unannounced change in the composition on the panel in the midst of oral argument in the Second Department on April 4, 2005), of which he had no prior notice. Pet. 6 n.6.

Moreover, settled law outside the Second Circuit shows that Petitioner was under no obligation to raise his federal claims in state court. Defendants never cite, much less analyze, precedent in the First, Sixth, and Seventh Circuits holding that a litigant in Petitioner's situation is not required to bring a federal claim in state court unless it arises as part of the "case-in-chief" of the state proceeding, *Habich v. City of Dearborn*, 331 F.3d 524, 531-32 (CA6 2003), or its "four corners." *Fernandez v. Trias Monge*, 586 F.2d 848, 852-53 (CA1 1978). *See also Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 529 (CA7 1988). Defendants do not dispute that Petitioner's constitutional challenge to the assignment system was completely unrelated to the state-law questions presented by the state-court complaints.

3. The Second Circuit created further circuit conflicts by applying *Younger* abstention at a time when there were no relevant pending state proceedings. When the Second Circuit applied *Younger* for the first time by any court in this case, it is undisputed that the relevant state-court proceedings cited in the federal complaint had terminated. Pet. 19.[2] Defendants' contention that the filing date of the federal complaint is the only pertinent time for assessing pendency conflicts with this Court's instruction that the time of decision is at least as

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[2] The Second Circuit was so advised in a letter brief filed at its request to address the *Younger* issue. *See* Plaintiff's Letter Brief of May 19, 2006.

important as the time of filing in determining whether *Younger* abstention is appropriate. *See Allee v. Medrano*, 416 U.S. 802, 817 (1974) (holding that question of whether *Younger* abstention was appropriate required a remand because there was no "indication in the District Court opinion or in the record that there were pending prosecutions at the time of the District Court *decision*") (emphasis added); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) (*Younger* inapplicable where "[n]o state proceedings were pending against either [federal plaintiff] at the time the District Court issued its preliminary injunction") (cited at BIO 9-10).[3]

Defendants erroneously disparage two of the dozens of cases Petitioner cited as evidence of the circuit conflict as involving mere "dicta." BIO 10. But the cases make clear that abstention is not appropriate where – as in this case – the state proceedings have concluded by the time the federal court announces its decision to abstain. As Judge Easterbrook has explained, pendency is a transitory phenomenon, not a permanent one. *Greening v. Moran*, 953 F.2d 301, 304-05 (CA7), *cert. denied*, 506 U.S. 824 (1992) (although *Younger* "[a]bstention was appropriate . . . when the district judge resolved the case," after "the state proceeding has reached its end, abstention is no longer appropriate"); *Leaf v. Supr. Ct. of State of Wis.*, 979 F.2d 589, 595 (CA7 1992), *cert. denied*, 508 U.S. 941 (1993) ("the time for [*Younger*] abstention has expired" because the "state proceedings [had] terminated before . . . this decision") (citing *Allee*, 416 U.S. at 817). As previously noted, Pet. 22-24 & nn.17-18, most other circuits agree.[4]

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[3] *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), cited at BIO 9, involved the situation where a federal district court had dismissed a federal action. But the District Court in this case did not rely on *Younger* to dismiss the federal claim. Rather, the District Court considered Petitioner's claim on the merits. The Second Circuit was the first court to invoke *Younger*.

[4] *See Guarino v. Larsen*, 11 F.3d 1151, 1157 n.1 (CA3 1993) (*Younger* inapplicable "because the state proceedings were completed by the time

4. The Second Circuit created another circuit conflict by applying *Younger* abstention where the federal and state proceedings involved the same plaintiff. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have agreed with Judge Posner that *Younger* is inapplicable unless the federal plaintiff was a defendant in state court. Pet. 23 (quoting *Nader v. Keith*, 385 F.3d 729, 732 (CA7 2004) (Posner, J.), and citing numerous other cases). This is so because *Younger*'s "core" purpose is to bar a federal plaintiff from "derail[ing] the [state] prosecution" against him by "sui[ng] in federal court to enjoin the prosecution on the ground that the state statute on which it is based is unconstitutional." *Hoover v. Wagner*, 47 F.3d 845, 848 (CA7 1995) (Posner, J.).

Defendants are unable to cite a single case (besides the decision below) applying *Younger* where a federal court plaintiff was also a genuine state court plaintiff.[5] Instead,

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the district court took action on the merits"); *Bass v. Butler*, 258 F.3d 176, 179 (CA3 2001) (although abstention was once appropriate, state proceedings had since "run the[ir] course" and "[h]ence, abstention is now inapplicable"); *Canatella v. Calif.*, 304 F.3d 843, 855 (CA9 2002) (*Younger* abstention no longer appropriate because state proceedings against federal plaintiff had been completed); *Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 74 (CADC 1997) (although abstention was once warranted "because of the pending [state] proceeding," *Younger* "abstention has now been mooted by the end of that proceeding."). *See also Sullivan v. Murphy*, 478 F.2d 938, 961-62 (CADC), *cert. denied*, 414 U.S. 880 (1973); *Marran v. Marran*, 376 F.3d 143, 155 (CA3 2004); *Jureczki v. City of Seabrook*, 668 F.2d 851, 854 (CA5 1982), *cert. denied*, 475 U.S. 1045 (1986); *Edwards v. Ill. Bd. of Admissions*, 261 F.3d 723, 728 (CA7 2001).

[5] The closest Defendants come is *Fresh Int'l Corp. v. Agr. Labor Rel. Bd.*, 805 F.2d 1353 (CA9 1986), which they contend "appl[ied] *Younger* abstention even though the federal plaintiff was nominally a plaintiff in state court as well." BIO 11. In fact, the Ninth Circuit opined that, "[a]lthough *Younger abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court*, it applies here, because the judicial proceeding filed by [state plaintiff] was *not truly voluntary*; [that plaintiff] petitioned for review [in state court] only because [a state] Board

Defendants ostensibly attempt to "narrow[]" (BIO 12) the decisions cited in the Petition. But the attempt backfires. Defendants admit that the cases stand for the principle that, "[w]hen the plaintiff simultaneously seeks parallel remedies for the same harm in state and federal courts, the federal lawsuit does not threaten to entangle the lower federal courts in the day-to-day operation of the state courts." BIO 12. The inapplicability of *Younger* in this case follows *a fortiori*: Petitioner's parallel lawsuits threatened no "entanglement" at all because there was no overlap between the federal and state actions. The cases involved different claims, defendants, and remedies. The state-court lawsuits were filed against private and municipal parties and sought remedies for state-law claims such as fraud, nuisance, and defamation. In contrast, the federal lawsuit sought a declaration against state officers (not involved as parties in the state-court actions) on wholly different grounds. Thus, Defendants' own argument, far from explaining away the circuit conflict, in fact deepens it and undermines the Second Circuit's decision.

5. This case presents an excellent vehicle for resolving the *Younger* question presented, and Defendants' assertion otherwise is spurious. This case involves the guarantee of a fair decision-maker which lies at the heart of the judicial system. Further, this case arises at a critical time of crisis for the New York judiciary. The *Lopez Torres* decision has held unconstitutional the method of selecting the very state-court judges at issue in this case, while grand jury investigations of corruption in the state judicial system have led to criminal guilty pleas.

a. Standing is not an obstacle to this Court's review. This Court may decide the *Younger* question without reaching the standing issue, as the Second Circuit did. Pet. App. 9a n.1. The Second Circuit can then consider the standing issue

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initiated agency proceedings and entered an order against the [plaintiff]." 805 F.2d at 1360 n.8 (emphases added; citation omitted).

on remand. In any event, there is standing because, at the time the complaint was filed, Petitioner was involved in pending litigation in the Second Department. *See Newman-Green, Inc., v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). For this reason, Petitioner is not "in the same position as any other resident of suburban New York city who might desire prophylactic declaratory or injunctive relief." BIO 14.

A suit brought by a plaintiff with standing at the time the complaint is filed does not become moot when it is capable of repetition yet evading review. As Petitioner argued below, "[i]n a Rule 12(b)(6) posture, it is not unreasonable to conclude that Plaintiff's business and property interests could lead him to future litigation in the Second Department." Plaintiff's Letter Brief to CA2 of May 19, 2006.[6] Defendants' suggestion that the dispute would not "evade" review because of the possibility of future state-court proceedings ignores the fact that this Court has consistently focused on whether the dispute in question would evade

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[6] *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (dispute not moot "in view of the multiple institutional placements [plaintiffs] have experienced"); *Morse v. Republican Party*, 517 U.S. 186, 235 n.48 (1996) (dispute not moot where defendant "has not disavowed the practice" under challenge); *Honig v. Doe*, 484 U.S. 305, 341 (1988) (case not moot where there was a "substantial likelihood" that plaintiff would suffer same harm); *Burlington N. R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (parties "reasonably likely" to find themselves in future disputes); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) ("[I]t can reasonably be expected that Roadway, one of this Nation's largest interstate trucking companies, will be subjected to similar preliminary orders in the future."); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) ("likely" that party would again submit mining plans); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future").

federal court, as opposed to *state* court, review.[7] In addition, as noted previously, Petitioner has no effective remedy in the state courts and is not obliged to raise his federal claim there.[8]

b. Defendants' discussion of the merits of Petitioner's claim (BIO 15-17), which the Second Circuit did not reach, Pet. App. 9a n.1, need not detain this Court. Defendants mischaracterize Petitioner's claim and the allegations in his complaint, which must of course be taken as true at this stage of the case. Petitioner alleged that the case assignments in his appeals were manipulated for improper purposes, Pet. 7, and he asserted a right to a *non-manipulated* process rather than to a random one. *See Tumey v. Ohio*, 273 U.S. 510, 534-35 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). Defendants' contention that there are other permissible assignment systems besides random allocation is therefore beside the point. Defendants do not deny that no other state or federal court has adopted a case assignment process like the Second Department's. Pet. 4.

Defendants' suggestion that Petitioner's cases were related to each other and thus could have been "deliberate[ly] assign[ed]" to the same panel of judges, BIO 1, 17, betrays Defendants' desperation. The suggestion contradicts their

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[7] *Wisconsin Dept. of Industry, Lab. & Hum. Rel. v. Gould, Inc.*, 475 U.S. 282, 285 n.3 (1986) (finding test of "capable of repetition, yet evading review" to be met in suit against state officers, despite availability of subsequent suit in state court); *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 U.S. 1, 6 (1986) (noting possibility of similar closure order in the future that would be subject to state-court review); *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 603 (1982) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (same).

[8] Defendants' reliance (BIO 14) on Justice Stevens' concurring opinion in *Nike, Inc. v. Kasky*, 539 U.S. 654, 657-58 (2003), is misplaced, for that opinion cited three factors for dismissing certiorari – (1)the absence of a final state-court judgment, (2) the absence of Art. III standing at any stage of the proceeding, and (3) the presence of difficult First Amendment questions – none of which is applicable here.

own insistence (BIO 16 n.5), as well as the official position of the Clerk of the Second Department (Pet. 5 & n.3), that Petitioner's appeals were randomly assigned (despite the undisputed statistical evidence to the contrary).[9]

Defendants' argument that this Court previously denied cert. in *Kaufman v. Fass* (BIO 15) does not militate against review. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotation marks and citation omitted). Rather, the cert. denial in *Kaufman v. Fass* shows only that the problem has not abated since then and that the Second Department will not correct its unconstitutional system on its own.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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[9] Any claim that the state-court appeals were related also fails to recognize: (1) the appeals involved different defendants, different legal issues, and different relief; (2) the only two proceedings that were truly "related" – the two LLC Appeals, Pet. 6 n.5 – were not treated as such by the state court; (3) there was direct evidence of manipulation at the oral argument on April 4, 2005, *id.* at 6 n.6; (4) Defendants concede that only two of the appeals were treated under a state rule (22 N.Y.C.R.R. § 670.7(c)(2)) "providing that related cases may be set for argument before a single panel," BIO 3; and (5) the remaining cases were not consolidated or otherwise treated as related cases heard by the same panel. Instead, certain hostile Justices reappeared on different panels hearing Petitioner's appeals, in a manner that was in no way authorized by 22 N.Y.C.R.R. § 670.7(c)(2) and that could only have been the product of manipulation.

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